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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 MARK I. SOKOLOW, et al.,

4 Plaintiffs,

5 v.

04 CV 397 (GBD)

6 PALESTINE LIBERATION  
7 ORGANIZATION, et al.,

8 Defendants.

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9 New York, N.Y.  
10 January 12, 2015  
11 9:40 a.m.

12 Before:

13 HON. GEORGE B. DANIELS,

14 District Judge

15 APPEARANCES

16 ARNOLD & PORTER LLP  
17 Attorneys for Plaintiffs  
18 BY: KENT A. YALOWITZ  
19 PHILIP W. HORTON  
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THE COURT: You could be seated.

(Case called)

THE COURT: Good morning.

MR. YALOWITZ: Good morning, your Honor.

THE COURT: Let me first address the potential jurors because we need to notify -- I told the jury room that we'll try to notify them early this morning as to which jurors to come back.

I have the letter from the defense with regard to the process. Let me first explain to you, which I think is fairly obvious, explain to you how I came up with this list of 50 jurors to bring back, and then we can address the defendant's issue and come up with a solution for that.

Obviously, the first thing as I said I will do is I look to see whether or not there were people that both sides said were specifically indicated were acceptable for voir dire. Unfortunately, there were none. So that put that process aside. Then I look for individuals who were designated by as acceptable for voir dire by one side and not objected to by the other side.

My recollection is that there were four for the defense and 32 for the plaintiff. That's not an exact number, it's about where it was.

I think overall the defendants indicated 17 were

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1 acceptable for voir dire and plaintiff indicated 52 were  
2 acceptable for voir dire. And so there is a discrepancy. I'm  
3 not going to say that the discrepancy is necessarily because of  
4 the objections. Because when I looked at it, I think the  
5 defendant objected to 26 and the plaintiff objected to 27. So  
6 it's not like there was an inordinate amount of objections by  
7 one side or the other. But the bottom line is I came up  
8 with -- this is the process that I came up with so you could  
9 have a fair cross-section of jurors to pick from. I found four  
10 for the defense that they said they were acceptable that the  
11 other side did not indicate they thought were unacceptable, and  
12 I identified the 32 that fell into that category for the  
13 plaintiff. I decided that to select a pool of 50, the first 50  
14 of those people, that no side said they thought was  
15 unacceptable. What I was going to propose is this -- well, let  
16 me tell you how I selected those 50. I took the four from the  
17 defendants that they say were acceptable for voir dire and the  
18 plaintiff didn't object to, and then I took another matching  
19 four, the first four from the other side. So I have four  
20 people from both sides that one side said was acceptable for  
21 voir dire and the other side did not say it was unacceptable  
22 for voir dire. So that's it.

23 Then I picked fairly at random, which would give us at  
24 least enough people, more than people we need. I went through  
25 the first 50 to get the first 50 jurors who were eligible for

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1 voir dire based on that analysis. What I did is I looked -- I  
2 took the other 28 that the plaintiff said were acceptable for  
3 voir dire and defendant did not object, and I matched that with  
4 an equal number of people that neither side checked off a box.  
5 So all of that 50 are people that neither side said was  
6 objectionable.

7 Now what I propose, and then we can discuss how the  
8 plaintiff wants to proceed -- what I propose is that I bring in  
9 those 50, all those 50 who are eligible for voir dire; that  
10 today that I seat in the box, the 18 seats among which you're  
11 going to choose, that I seat first the four that each of you  
12 pick, that eight, and then I randomly pull from the box out of  
13 those 50, ten more names. Those 18 will be the jurors that  
14 we'll voir dire, unless someone indicates tomorrow that there's  
15 a challenge for cause, and then we have to replace that with  
16 one of the people out in the audience.

17 Then I propose again to keep it randomized. I propose  
18 that tomorrow morning you'll know what the numbers are, but  
19 tomorrow morning when the jurors arrive into the courtroom,  
20 that we put the 18 names in the box, in the wheel, and we spin  
21 the wheel. And the order in which those 18 names come out is  
22 the order in which those people are going to be seated, okay.  
23 So that is my proposal and that's what I propose doing.

24 Now, the defense has raised an issue they want to  
25 dispute some of the designation that, the objections that the

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1 defendant, the plaintiff had which would amount to challenges  
2 for cause. Quite frankly, if you want to do that, that opens  
3 up the process for both sides if you want to do that. And so  
4 I'm not sure you're going to end up being better than what you  
5 would have had. But it's clear to me that the 50 that I intend  
6 to call are people that no one had a reaction that those people  
7 couldn't serve as jurors. But if you want to discuss some of  
8 these jurors, I'm not going to spend a lot of time going  
9 through every single juror. But I'm inclined to -- I may be  
10 inclined to bring in a smaller number than 50, maybe bring in  
11 40, and listen to any objections that the defendant has. And  
12 if the plaintiff wants to say objections too, they could say  
13 it -- but any objections that the defendant has to any of the  
14 people that they chose, which is what the letters complain  
15 about, that they think is acceptable for voir dire that would  
16 constitute a challenge for cause by the plaintiff, and I'll  
17 hear plaintiff on what basis there is a challenge for cause and  
18 then I'll rule, if you want to do that. But I'm not going to  
19 go through everyone of them because I don't think -- we  
20 probably don't even need more than 25 jurors here. And in  
21 excess of caution and to keep randomizing the process, I went  
22 to 50. But if we're going to have to spend the time going  
23 through each juror, I'm probably going to cut it down to 40.  
24 I'm not going to go beyond the 40 to hear objections because  
25 they would not have been brought back in, okay. So that's my

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1 position. And, quite frankly, if I look at that, I think --  
2 what was the number -- the last number we had? Well, you can  
3 do that process yourself. If you cut out the last ten jurors,  
4 potential jurors, then I think the number is -- I had marked it  
5 off. I lost it. I think we go -- I think the 40th number is  
6 what?

7 MR. HASHIMITO: Judge, I think it's 107. voice.)

8 THE COURT: That makes --all right. So if I knocked  
9 off the last ten, we would be at 107. I see that the defense  
10 said that they designated four people between 120, up to 120  
11 that the -- as a matter of fact, designated four people 12, 25,  
12 49 and 60 within that number that the plaintiff said -- marked  
13 off as they thought were objectionable. So if you want to  
14 discuss those four and see whether you want me to throw those  
15 in the mix, you know, I'll consider that, you know. But  
16 otherwise -- quite frankly, I don't think it's going to make a  
17 big difference. And I've looked at those four and started to  
18 look at the others even beyond that, and I'm not sure that --  
19 well, you can tell me what, if you want to dispute that, you  
20 can dispute that. But the process as I laid it out is what I  
21 intended. I bring back the 50, we spin the wheel today, we get  
22 ten names, we'll have 18 names. You'll know today, those are  
23 the people who you're going to voir dire in the box initially.  
24 Tomorrow morning when they walk in just randomly pull these 18  
25 names out of the box and seat them in that order, and then I'll

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1 have some basic questions and you can propose some other basic  
2 questions. We don't have to go through obviously all of the  
3 basic information you already have, but I just want to have  
4 some dialogue with each juror and I want to have them reassure  
5 us that they can be fair and impartial jurors in this case.

6 So let me first start with the defense. What did you  
7 want to do?

8 MR. HILL: Your Honor, we do want you to invite the  
9 jurors that were challenged for cause. Now to be candid there  
10 were 13 of them that we designated as acceptable.

11 THE COURT: Right.

12 MR. HILL: And the plaintiffs challenged for cause. I  
13 think with respect to six of them, the jurors did check there  
14 was a concern about their impartiality. But for seven of them  
15 they did not.

16 THE COURT: I know. But now I'm only dealing with the  
17 first four that you dealt with, because I would have never  
18 gotten to the others.

19 MR. HILL: I understand. So numerically those, in my  
20 view, are two different categories. See juror number 12 did --

21 THE COURT: Let me -- hold on just a second. Let me  
22 have the? You would oppose an objection for cause to juror  
23 number 12.

24 MR. HILL: They're two different categories. Juror  
25 number 12 is a harder case for me to make, I acknowledge.

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1 THE COURT: You got to tell me. They said they could  
2 challenge this person for cause. You have to tell me whether  
3 or not you think that there is a legitimate basis to challenge  
4 for cause given the answers to these questions.

5 MR. HILL: Well, we can talk about each of them if  
6 your Honor wants to.

7 THE COURT: Well, I am because that's the only way I  
8 can rule on challenge for cause.

9 MR. HILL: So the very last question on number 12, the  
10 juror did indicate that they could be fair and impartial. And  
11 the concerns that the juror articulates are about general  
12 issues about knowledge of the conflict. And I think that if  
13 the juror was here and was questioned, the juror would affirm  
14 what he said in 61, which is that he can be fair and impartial.  
15 And I think the juror just needs to be focused on following the  
16 Court's instructions, which they indicated they could do in  
17 question number 52, and applying the facts to the law in the  
18 case.

19 THE COURT: Well --

20 MR. HILL: But I acknowledge this juror did indicate  
21 they had some concerns about their impartiality.

22 THE COURT: And I can tell you what I did, because I  
23 made my own designations when I first got them back before I  
24 heard from you. And the main questions I went to were  
25 questions 43, 45, 49, 52, 53, 54, 56, 57, 59, 60 and 61. The



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1 first question I'm went to is 61. If they answered no to 61,  
2 they can assure all sides they can be fair and impartial juror  
3 I put a no next to that and on my list that already exists.  
4 So, for example, I think number two and number three already  
5 have a no and number of them before 12. I didn't look as  
6 carefully at the other questions. Once I looked at that  
7 question, because that sort of gave me the guide that I think  
8 is going to be a big, a lot of dispute about, but I mean, quite  
9 frankly -- I mean, I will consider seating this person and I'll  
10 hear what the objections for cause is. But, quite frankly, I'm  
11 not sure why you would want this person, given the answer, the  
12 answer given to question number 44 and 45.

13 MR. HILL: Well, that's the, in part, why I wanted to  
14 invite him back was to explore and hear what his views were,  
15 whether or not he can set them aside and be a fair and  
16 impartial juror. So that's why --

17 THE COURT: Why would I invite somebody back who says  
18 they have feelings or opinions about these individuals that  
19 would make it difficult for them to be a fair and impartial  
20 juror to all sides, what would be the purpose of that?

21 MR. HILL: If we're looking on question 45 on juror  
22 number 12, the person's answer refers to certain organizations  
23 as non-state militant/terrorist organizations that use violence  
24 as their primary activity. Now if that's a reference to Hamas,  
25 that's not a problem from our perspective.

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1 THE COURT: Well, but --

2 MR. HILL: That --

3 THE COURT: I am looking also at question 43 and, 42  
4 and 43. Why would you want this person?

5 MR. HILL: I don't necessarily have a problem with  
6 that answer.

7 THE COURT: You don't have a problem with the answer  
8 do you have any feelings or opinions about the PLO or the PA  
9 that would make it difficult for you to be a fair and impartial  
10 juror to all parties in this case?

11 MR. HILL: Yeah, that's why I wanted to invite him  
12 back and explore.

13 THE COURT: I know, but you must have a problem with  
14 that answer.

15 MR. HILL: No, actually I don't. That's why we  
16 designate it as acceptable.

17 THE COURT: So you don't have a problem with people  
18 who say that they have feelings or opinions about the PLO or  
19 the PA that would make it difficult for them to be a fair and  
20 impartial juror?

21 MR. HILL: It depends on what the feelings are. This  
22 particular juror's answer did not cause me to think there was  
23 cause.

24 MR. YALOWITZ: See, your Honor, that's the problem  
25 that I have.

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1 THE COURT: You want this guy out?

2 MR. YALOWITZ: Yeah, I do. You know, the way we  
3 approached it was we looked at people who said I have strong  
4 feelings. Some of them said I have strong pro Israel feelings.  
5 I said well, you know, Judge Daniels isn't going to want that  
6 person, it's not fair to the process, we're going to check that  
7 person as cause. Some said I have pro Palestinian feelings  
8 that make it difficult. I said I don't want that person. So  
9 that is guy who is personal friends with King Abdullah of  
10 Jordan. He says I don't -- it's going to be a problem for me  
11 to be a juror because I'll get fired and I don't want to get  
12 fired. This seems like a guy who we shouldn't be bringing  
13 back.

14 And let me just stay if we're going to start reopening  
15 cause, I got a lot of problems with the defendant's challenges.

16 THE COURT: I understand that.

17 MR. YALOWITZ: We can go start doing that.

18 THE COURT: Well, as I say, I'm not going to spend a  
19 lot of time doing that. I'm going to cut down the number and  
20 I'm going to just hear whatever numbers would have been cause  
21 within that number and I'm already willing to cut it down to 40  
22 instead of 50, because if we're going to add more people or  
23 substitute people. But, quite frankly, I don't, I mean --

24 MR. HILL: Your Honor --

25 THE COURT: Mr. Hill, let me tell you also what my

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1 thinking is.

2 Part of the problem that I have is that if you bring  
3 this juror back, I am going to question this juror in the box.  
4 If this juror gets in the box, I'm going to question this juror  
5 in the box about these questions in front of other jurors,  
6 okay. Now, you see what this person said in answer 44. Now,  
7 if you want this juror to explain in front of the other jurors  
8 why they think -- and I'm not going to even repeat it for the  
9 record -- but why they believed this, then that's -- I'm going  
10 to have -- that's a danger that, quite frankly, it's not worth  
11 bringing this juror back for you to take a chance that he's  
12 going to say something that might affect the other jurors. So  
13 particularly on an individual who clearly answered that they  
14 could not -- they had difficulty being a fair and impartial  
15 juror. And, quite frankly, the difficulty they seem to have  
16 seems to be, if anything, a difficulty with information they  
17 have about your client, rather than the difficulty with  
18 information they have about the plaintiffs or Israel on the  
19 side of the Palestinian Israeli conflict. So --

20 MR. HILL: Can we set number 12 aside? Because I  
21 agree there are issues with this juror. Maybe we can focus on  
22 the ones where I think there really is an issue according to  
23 the question.

24 THE COURT: Let me say this, let me just say this. I  
25 think given the answer to these questions, that I think that

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1 there is a valid challenge for cause.

2 MR. HILL: We can --

3 THE COURT: And I would sustain the challenge for  
4 cause if this juror, this juror was challenged based on these  
5 questions. And, quite frankly, there is not a whole lot this  
6 juror could say to me that would change my mind given the  
7 direct nature of these questions, so.

8 MR. HILL: I understand your Honor's ruling. We can  
9 go to the next one.

10 THE COURT: I want the record to be clear that you  
11 object to this juror not sitting in as a juror. If it's a  
12 challenge for cause, if it were a challenge for cause by the  
13 plaintiff, I am going to sustain that challenge for cause  
14 unless you can make some argument that somehow the answers to  
15 these questions qualifies this juror as a fair and impartial  
16 juror.

17 MR. HILL: I've already said all could be said based  
18 on the records we have, your Honor.

19 THE COURT: Then I'm putting that aside.

20 MR. YALOWITZ: Your Honor, may I just be heard on one  
21 thing that I think needs to come into the mix before Mr. Hill  
22 continues?

23 Over the weekend we noticed, and I'm embarrassed that  
24 we didn't notice this before, but over the weekend we noticed  
25 that two of the jurors gave personally identifying information

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1 in their questionnaires. And because of the anonymity of the  
2 juror, I'm concerned that those two jurors could be either  
3 identified based on -- they gave the names of who they live  
4 with. So either they could be identified or they might have a  
5 concern.

6 THE COURT: Are they among the 50?

7 MR. YALOWITZ: They are. That's why I'm raising it.

8 THE COURT: Okay. Do you --

9 MR. YALOWITZ: It's number --

10 THE COURT: You don't have to tell me the number.

11 MR. YALOWITZ: Okay, I can --

12 THE COURT: Mr. Hill, do you know who he's talking  
13 about?

14 MR. HILL: I don't specifically. I did notice a  
15 couple of people gave names, but right now none of this is in  
16 the public record and I don't intend to put any of that in the  
17 record so.

18 THE COURT: Let's put that aside for now and let's  
19 see.

20 MR. YALOWITZ: But do I think those two should not be  
21 called back for that reason.

22 THE COURT: All right, we'll come back to that.

23 MR. YALOWITZ: Okay, thank you.

24 THE COURT: Mr.

25 MR. HILL: I don't know what the numbers are, so maybe

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1 Mr. Yalowitz can write them on a note and we can --

2 THE COURT: Why don't you just share the number with  
3 him and then see if you can agree whether or not I should bring  
4 them back or not.

5 MR. HILL: The next juror that we designated as  
6 acceptable to the plaintiffs and challenge for cause is juror  
7 number 25.

8 MR. YALOWITZ: Can I do one, your Honor? Because I  
9 have one that I'd like to do.

10 THE COURT: Wait a minute.

11 MR. YALOWITZ: I mean he gets to do all mine and I  
12 don't get to do his? Is that how we're going to do it?

13 THE COURT: No, that's not how we're going to do it.  
14 We're going to let him do his first, then we can give you a  
15 full opportunity to do yours if you want to do yours.

16 MR. YALOWITZ: Okay. Thank you, your Honor.

17 THE COURT: All right.

18 MR. HILL: So for juror number 25, the juror did not  
19 check yes to any of the questions your Honor had indicated  
20 would potentially be for cause.

21 61, they indicated they could be impartial. And then  
22 the ones in the 40s, they also indicated that they could be  
23 fair and impartial.

24 THE COURT: Well, this person said that they're  
25 scheduled to start volunteering at a new Hospice program that

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1 could lead to a job, and I don't want to miss the opportunity.

2 And with regard to answer 60 said, I'm supposed to  
3 start Hospice training to volunteer. This could lead to a job  
4 opportunity that I don't want to miss.

5 Now, if you want me to bring this juror here in and  
6 your position is that even though this juror stated that  
7 problem -- and we have plenty of jurors who haven't stated such  
8 a problem -- that you want me to force that juror to sit on  
9 this case despite this concern, then I will consider bringing  
10 this juror back. But you're going live with the fact that this  
11 juror's indicated that they have a conflict and that may  
12 interfere with their assessment and concentration on this case.  
13 If you wish to take that chance, even though you have other  
14 people who don't state -- you have plenty of people who don't  
15 say that, then I'm willing to do that. But I'm not going to  
16 bring this juror in and with the ultimate decision that you  
17 really don't want to force the juror to stay here if the juror  
18 has a genuine conflict with serving, so.

19 MR. HILL: At this point we do want her to be invited  
20 back, your Honor.

21 THE COURT: All right. Well let me put that aside for  
22 a second and we'll come back to that.

23 What about the other people?

24 MR. HILL: Do you want me to go in numerical order or  
25 what, I --



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1 THE COURT: I want you to go to 49.

2 MR. HILL: 49, yes, your Honor.

3 THE COURT: Because I don't know if there's anybody  
4 else between 25 and 49.

5 MR. HILL: Yeah. 49 did check yes to questions 43 and  
6 44, and then referred to those answers in subsequent questions.  
7 Again, the nature of the concern from the juror is general  
8 knowledge about the conflict. And I believe that the juror  
9 indicated they could follow the Court's directions and apply  
10 the law to the facts that are in evidence, and we think the  
11 juror should be seated for that purpose. We don't think the  
12 person is unfair or lacks partiality based on the content of  
13 the questionnaire.

14 THE COURT: Well, the juror said in answer 45, I would  
15 want to be impartial and truthfully can find this difficult.

16 MR. HILL: I suspect many of the jurors are going to  
17 find the case difficult, but this person --

18 THE COURT: No. There are plenty of jurors who say  
19 they any didn't find it difficult to be impartial. That's not  
20 a question of whether they find the case difficult. And  
21 she's -- and then he or she said on line 60, question 60, is  
22 there any reason at all why you think you can not serve on this  
23 jury. It says, only what I've already stated. And it says,  
24 see below. And question number 61 where I ask can you assure  
25 the Court and all parties that you can serve as a fair and

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1 impartial juror on this case, the juror checked neither the yes  
2 box nor the no box, but wrote in, I would try, but please see  
3 above.

4 As far as I'm concerned, that disqualifies the juror.

5 MR. HILL: I understand your Honor's ruling.

6 THE COURT: So I would -- would you have a challenge  
7 for cause with regard to this juror based on those answers?

8 MR. YALOWITZ: Yes sir.

9 THE COURT: All right. Then I would grant that  
10 challenge for cause.

11 MR. HILL: All right. The next one numerically, your  
12 Honor, is number 60.

13 THE COURT: I looked at number 60. My recollection is  
14 that is more of a time job -- maybe --I could let the other  
15 side articulate the objections. But let me just tell you that  
16 the answer given to 48, 49, 53, 54, 56 and the additional  
17 answer added on 19 give me serious concern about seating this  
18 person as a juror.

19 MR. HILL: I don't have any ability beyond what's in  
20 the questionnaire. If your Honor's inclined to sustain the  
21 cause challenge, I don't have anything to add to what the  
22 witness has already said.

23 MR. YALOWITZ: We would --

24 MR. HILL: Juror said.

25 MR. YALOWITZ: We would make such challenge, your

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1 Honor.

2 THE COURT: All right, then I would grant such a  
3 challenge.

4 MR. HILL: The next juror in this category numerically  
5 is number 120.

6 THE COURT: Right, which we will never get to.

7 MR. HILL: Well, at this point we've only put back  
8 into the pool one of the --

9 THE COURT: Right.

10 MR. HILL: -- persons that we indicated.

11 THE COURT: To save time, I am going to cut the number  
12 down to 40. We're going to bring in 40. And within the first  
13 40 people who are eligible you don't have any other objection,  
14 any other concerns. These are the only people in that 120 that  
15 you said were you wanted -- you said were acceptable and that  
16 they challenged.

17 MR. YALOWITZ: Your Honor, if we're going to go to the  
18 randomized system I wouldn't mind the 50. If he wants to talk  
19 about juror number 120, that doesn't bother me.

20 MR. HILL: It's actually the ones after 120 that I  
21 would like to talk about, yeah.

22 THE COURT: Hold on just a second.

23 I think the last -- what is the last number? Last  
24 number we had was 192. All right. You say 120?

25 MR. HILL: 120 we can discuss if the Court would like

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1 to. This individual is pregnant so I think she may well be  
2 excused for hardship.

3 THE COURT: Okay. So I can take her off the list you  
4 say you --

5 MR. HILL: I assume you would sustain --

6 THE COURT: I'm asking you. Not necessarily. You  
7 want me to force her to sit? That's my decision. If you say  
8 there is no challenge for cause, not a valid challenge for  
9 cause and you want to make her stay, then I'm going to tell her  
10 like everybody else that you're going to have to stay.

11 MR. HILL: It would only be if the case is going to  
12 get shorter and I honestly don't know the answer to that.

13 THE COURT: So you want -- you oppose this excusing  
14 this juror or not?

15 MR. HILL: No. She may be excused.

16 THE COURT: Okay, then that's set. Anything else?

17 MR. HILL: Number 141.

18 THE COURT: 141.

19 MR. HILL: This juror indicated in the final question  
20 that they could be fair and impartial, and their answers to the  
21 other ones go to general knowledge of the conflict. They  
22 indicated in 45, they answered that question yes, but they did  
23 not explain why. So I think at a minimum this juror should be  
24 invited back.

25 THE COURT: Let me just look at it.

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1 Mr. Yalowitz, is there reason that you would challenge  
2 this juror for cause?

3 MR. YALOWITZ: My concern was this is a young person  
4 who's been recently laid off and is looking for work. And it  
5 seemed to me that given the large number of people we have who  
6 are not suffering economic hardship, that juror should be  
7 excused for that reason, your Honor. That was question 56.

8 THE COURT: Juror on 56 said that she had an unusual  
9 financial hardship, a serious problem would prevent her from  
10 serving as a juror for the duration of this case, because she  
11 was recently laid off, currently interviewing for new position.

12 MR. HILL: If your Honor thinks that's a such  
13 hardship, your Honor.

14 THE COURT: Well, I don't have to think about it at  
15 all, unless you object to it, unless you want her here. You  
16 want me to make her come back?

17 MR. HILL: It's not clear to me that that would  
18 qualify as a hardship.

19 THE COURT: But that's not my question. My question,  
20 the way I --

21 MR. HILL: I want them back, yes, your Honor, if  
22 that's the question.

23 THE COURT: The way I proceed is if there is a  
24 challenge for cause usually, I don't even want to hear the  
25 explanation unless the other side opposes. If both sides say

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1 let's not bother to make this juror serve, then that's good  
2 enough for me.

3 MR. HILL: I think this one should be brought back.

4 THE COURT: You think this juror should serve?

5 MR. HILL: Yes, your Honor.

6 THE COURT: All right. Let me put that aside with  
7 number, what was the one I put aside, 25?

8 MR. HILL: 25.

9 THE COURT: All right.

10 MR. HILL: 148 is the next one, your Honor.

11 THE COURT: All right, 148.

12 MR. HILL: Here the concern of this juror was that  
13 this was a case that was a dispute between an employee and  
14 employer. This is --

15 THE COURT: I have no idea what this juror, what room  
16 this juror was in.

17 MR. HILL: Yeah, the juror was apparently checked  
18 out --

19 THE COURT: Thinks this is an employment  
20 discrimination case.

21 MR. HILL: Right. But it's obviously not.

22 THE COURT: You think this juror is qualified to sit  
23 if she sat there in that room and as a lawyer and thought this  
24 was an employment discrimination case?

25 MR. HILL: Yes, your Honor. I would like the juror to

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1 be returned. I don't believe this answer disqualifies them.

2 THE COURT: All right.

3 MR. HILL: It is a respondeat superior case, they just  
4 mistook it as a dispute between an employer and employee.

5 THE COURT: Mr. Yalowitz, you want this juror brought  
6 back and voir dired?

7 MR. YALOWITZ: No. I really don't want people who  
8 don't listen to the Court's instructions to sit as jurors. You  
9 know, you didn't tell the jury that is respondeat superior  
10 case. It was a very clear and simple instruction. And I agree  
11 with you, I don't know what room the juror was in. Maybe  
12 the -- but whatever, I just think if we have somebody who  
13 doesn't have the mental capacity to fill out the form, you  
14 know, in a way that relates to the instructions that the Court  
15 gave, that's a serious concern for me.

16 THE COURT: Let me just -- I remember reading this.  
17 What --

18 MR. HILL: Your Honor's remarks did mention whether it  
19 was within the scope of the employment and whether it was for  
20 the benefit of the employer, which is what I think this person  
21 heard.

22 THE COURT: Well on top of that, the answer to  
23 choices, the requests from 53 were yes or no. She made a third  
24 box and checked a maybe.

25 MR. HILL: Right, because I think she misunderstood

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1 what the case was about.

2 THE COURT: I mean, I just want the record to be  
3 clear, that kind of person you want on this jury?

4 MR. HILL: We do want this person to be returned, your  
5 Honor.

6 MR. YALOWITZ: Your Honor, may I be heard for just one  
7 other --

8 THE COURT: Just a second. Let me just --

9 MR. YALOWITZ: Sure.

10 THE COURT: And number 60, the answer to the question  
11 is there any reason at all why you think you can not serve on  
12 the jury, she checked no and put in parentheses, aside from 53.  
13 So that would mean 53 must be a yes.

14 MR. HILL: Well, they said it was maybe, but that's  
15 what the form says, your Honor. I think this could be very  
16 quickly cleared up with the juror when they return.

17 THE COURT: Can you assure this Court and all parties  
18 you can serve as a fair and impartial juror? Check yes in  
19 parentheses, but see 53, all right.

20 Mr. Yalowitz.

21 MR. YALOWITZ: That concerned me as well, your Honor,  
22 that the -- I want jurors who say, look, I understand, I'm  
23 going to bring my life experience, but I can be fair, I can set  
24 aside my concerns. This is a juror who doesn't even understand  
25 what the case is about, and is already expressed concerns about



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1 his or her ability to be impartial. So that struck me as  
2 something that was of serious concern.

3 THE COURT: All right. You would challenge the juror  
4 for cause based on those answers?

5 MR. YALOWITZ: Yes, sir.

6 THE COURT: All right I would grant such a challenge.

7 MR. HILL: All right. Numerically, your Honor, the  
8 next one is 154.

9 THE COURT: Okay.

10 MR. HILL: And this person I don't think checked any  
11 of disqualifying questions.

12 THE COURT: Yeah, 54.

13 MR. HILL: They indicate some general familiarity with  
14 the parties and the people involved and the conflict, but they  
15 indicate they can otherwise be fair.

16 THE COURT: Mr. Yalowitz, what's the basis for your  
17 objection?

18 MR. YALOWITZ: My concern with 154, your Honor, is  
19 that this is a person who studied international development,  
20 has observed elections in the Middle East, is a consultant for  
21 the National Democratic Institute of International Affairs and,  
22 despite all that extensive experience with the Middle East,  
23 says in response to question 42, I have heard of the PLO. And  
24 in response to question 44 says, about the organizations and  
25 interviews, they may have held leadership positions.

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1 THE COURT: I'm sorry, what question are you --

2 MR. YALOWITZ: I'm sorry. 44, your Honor. They may  
3 have held leadership positions and Hamas and the PLO may have  
4 united to work together. And then says with regard to the --  
5 Israeli Palestinian conflict that they think it's something  
6 about priority and land. So I was concerned that this was a  
7 juror who was very well educated, and yet was masking  
8 knowledge, and that was of concern to me.

9 THE COURT: Okay. But you don't have any basis,  
10 evidence for me to look at that indicates they're masking that.

11 MR. YALOWITZ: The basis is that they are very well  
12 educated and are involved with the democracy in the Middle East  
13 and claim not to know anything about the Israeli Palestinian  
14 situation.

15 THE COURT: Well, what makes you think the Middle East  
16 they're referring to Israel or Palestine?

17 MR. YALOWITZ: They say Egypt.

18 THE COURT: Right.

19 MR. YALOWITZ: And Pakistan.

20 THE COURT: That's not Israel or Pakistan.

21 MR. YALOWITZ: Right, Egypt Pakistan, Greece  
22 Mozambique, Angola, South Africa, lot of --

23 THE COURT: Lot of countries other than Israel and  
24 Palestine.

25 MR. YALOWITZ: That's my -- I'm telling you my concern

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1 candidly.

2 THE COURT: No, I understand.

3 MR. YALOWITZ: A well educated person who, you know,  
4 reads newspapers and is interested enough in the Middle East to  
5 go there to observe elections and then says, well, I don't  
6 really know very much.

7 THE COURT: Okay.

8 MR. YALOWITZ: That's of concern to --

9 THE COURT: If this is all the information that this  
10 juror gave us during voir dire, would you consider that to be a  
11 challenge for cause?

12 MR. YALOWITZ: I would have. I believe I would, your  
13 Honor.

14 THE COURT: Just based on this information?

15 MR. YALOWITZ: I believe it's not credible. I --

16 THE COURT: I mean, which part of -- I'm not sure I  
17 understand which part you say is not credible.

18 MR. YALOWITZ: I don't think it's credible to say I  
19 only know a little, and when they spend all that time abroad.  
20 So that's my problem with that juror.

21 THE COURT: Okay. But abroad is pretty broad.

22 MR. YALOWITZ: Well, Egypt, Pakistan.

23 THE COURT: You think that somebody who spent time in  
24 Egypt and Pakistan should be intimately familiar with the  
25 Israeli Palestinian conflict?

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1 MR. YALOWITZ: I think that somebody who has got a  
2 Master's Degree in international development and who supervises  
3 people for the National Democratic Institute for International  
4 Affairs and is a consultant for International Development is  
5 somebody and who reads the New York Times and the Washington  
6 Post and says I don't know much about the POL or Israel strikes  
7 me as somebody who is not being candid with the Court.

8 THE COURT: All right. Well, I would not have a basis  
9 to make that determination now. So I would not grant a  
10 challenge for cause to that juror just based on this without  
11 any further information. So I think that I probably would not  
12 sustain a challenge for cause.

13 MR. YALOWITZ: All right. I understand, your Honor.

14 THE COURT: Anything further?

15 MR. HILL: The next one numerically is 163, which I'll  
16 make it easy and withdraw. The next one after that is 190.  
17 This individual also did not answer any of the disqualifying  
18 questions.

19 THE COURT: 190.

20 MR. HILL: 190.

21 THE COURT: Mr. Yalowitz.

22 MR. YALOWITZ: You have to bear with me, your Honor.  
23 I didn't think we're going past 160.

24 THE COURT: I'm sorry, I haven't looked at this  
25 intimately.

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1 MR. ROCHON: We can share a copy with Mr. Yalowitz if  
2 it helps.

3 MR. YALOWITZ: If your Honor just bears with us, I  
4 can -- I think I know. We brought it.

5 THE COURT: Sure.

6 MR. YALOWITZ: We may have it in back. I think we've  
7 got it in back.

8 While we're waiting, should we do some of ours?

9 THE COURT: No.

10 MR. YALOWITZ: Okay. Because I've got a lot, I've got  
11 more than they do.

12 THE COURT: Well, I'm not sure, unless you want to  
13 replace the ones that you chose, I'm not sure that it's to your  
14 advantage to go all through that. But as I say I'm more  
15 inclined to bring in smaller number than a larger number if the  
16 two of you are still fighting and a smaller number of people  
17 who clearly are people who are qualified.

18 MR. YALOWITZ: I get it. I need to cut --

19 THE COURT: I'm not going to spend a whole lot -- I  
20 told the jury be able to contact these people I'd give them the  
21 names before 11 o'clock. That's what I intend to do.

22 MR. YALOWITZ: I think we.

23 THE COURT: Quite frankly, even there is no guarantee  
24 any of any of these people are going to sit in the box anyway.

25 MR. YALOWITZ: Bear with me on 190, and then maybe --

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1 THE COURT: All right.

2 MR. YALOWITZ: Maybe I can -- let me consult with my  
3 team.

4 THE COURT: Mr. Hill, did you have something beyond  
5 190?

6 MR. HILL: I think 213. I would withdraw 191 and 208  
7 in light of the way the rulings have been going so far.

8 THE COURT: Okay, all right. So you have one more you  
9 said.

10 MR. HILL: 213.

11 MR. YALOWITZ: Wait a minute. I'm sorry, your Honor.  
12 I can't do both things at once.

13 THE COURT: Well, you got an army of lawyers there.  
14 Why don't you do one thing, let them do something else. I  
15 mean --

16 MR. YALOWITZ: I don't want to waste time either.

17 THE COURT: Let me have 213. I'll give you plenty of  
18 opportunity to look at that. I just want to know so I can be  
19 ahead of you. Let me look.

20 MR. YALOWITZ: All right, good.

21 THE COURT: You know that's the next one.

22 MR. YALOWITZ: Your Honor, may I consult with my team  
23 for a moment?

24 THE COURT: Sure. On one in any I would have thought,  
25 quite frankly, that the two of you would have had the opposite

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1 positions that you have.

2 MR. YALOWITZ: You know what, your Honor, I've looked  
3 at 190. I don't have a problem with him. I'm just looking at  
4 213. I apologize for the delay.

5 THE COURT: No, that's okay.

6 MR. YALOWITZ: I just didn't think we're going this  
7 deep.

8 THE COURT: This is as deep as we're going.

9 213, I can tell you on question 56 this person says, I  
10 have a business conference scheduled in Zurich for  
11 February 10th. My family would join me after for the kids  
12 winter break. Missing the conference will be bad, and the loss  
13 of all airline tickets and hotel will be substantial. Give  
14 that significant weight. Question 60 says, as I described in  
15 the financial section, the length of the case means that an  
16 important conference will be missed and financial loss on  
17 planned vacation.

18 MR. HILL: I can't argue with that if that, your  
19 Honor, believes that's sufficient hardship obviously your  
20 Honor --

21 THE COURT: You know, as I say, the worst thing I  
22 could think you could have is jurors who don't want to be here.

23 MR. HILL: Very well. All right. Then, your Honor,  
24 where I think we are after that is of the ones that we  
25 designated as acceptable and they challenged for cause, four of

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1     them can be returned. Those are numbers 25, 141, 154 and 190.  
2     And so I would request that those four be returned in addition  
3     to the four that we designated as acceptable and the plaintiffs  
4     did not challenge for cause, which are 78, 93, 186, and 192.

5             THE COURT: Well, let me hear --

6             MR. YALOWITZ: I thought 25 was a problem because  
7     their schedule start volunteering at new Hospice program.

8             THE COURT: I have a problem with it. I don't know  
9     how serious this is going to be. The defense says they want me  
10    have to force this person to serve, even if --

11            MR. YALOWITZ: The other --

12            THE COURT: Possibly force this person to serve even  
13    if they're of that problem.

14            MR. YALOWITZ: The other serious concern I have, I had  
15    is that the juror's spouse was in the Iranian Army.

16            THE COURT: What question?

17            MR. YALOWITZ: This is 18.

18            THE COURT: 18?

19            MR. YALOWITZ: Yeah.

20            THE COURT: I see.

21            MR. YALOWITZ: And then there is just one other thing  
22    that bothered me about this juror, your Honor, which was that  
23    question 48 she says she had common knowledge, and referenced  
24    the word occupation, which struck me as somebody who had  
25    political views that would leak in the case.



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1 THE COURT: I'm sorry, which question are you at?

2 MR. YALOWITZ: I flipped away from it. 48. But I  
3 think, frankly, the bigger issue is the person expressed  
4 reservations about not wanting to lose the volunteer  
5 opportunity, and she said in question 60 that that would, that  
6 that would be a reason why she couldn't serve on the jury.

7 THE COURT: Well, as I say, my view, standard view is  
8 that if the parties didn't want to make her stay because of  
9 that, I would let her go. But if one side thinks there is a  
10 possibility that she might give answers to those or other  
11 questions that would make her a fair and impartial juror, you  
12 want to make her stay, I'll make her stay.

13 MR. HILL: We do want her to return, your Honor.

14 THE COURT: Let's put those four aside for now and  
15 let's see. Mr. Yalowitz, did you want to go through this  
16 process also?

17 MR. YALOWITZ: Not really.

18 THE COURT: I posed it that way. If you want me to --

19 MR. YALOWITZ: Before we just do kind of tit for tat,  
20 let me understand what -- I mean because I got a lot. I got a  
21 lot more than they do.

22 THE COURT: Well it depends if it turns out to be to  
23 your advantage because --

24 MR. YALOWITZ: That's what I'm trying to figure out.

25 THE COURT: You know, I'm not going to just add

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1 another 20 people. I'm going to knock out some of the people  
2 that got us to 50. We're not going beyond 50. All right. So,  
3 you know, maybe I'd be willing to throw these four in on top of  
4 the 50 and then pull them out of the wheel today, and you could  
5 seem who is going to be in the box. But, you know, I'm not  
6 going to add another 20 people. I'm more inclined, as I say to  
7 cut it down to 40.

8 MR. YALOWITZ: Here's what I'm thinking.

9 THE COURT: Because we have more than enough jurors  
10 who could serve as fair and impartial jurors in this case.

11 MR. YALOWITZ: Here's what I'm thinking is, here's my  
12 recommendation to the Court.

13 THE COURT: I may take it.

14 MR. YALOWITZ: All right. I would think the Court  
15 should remove the two jurors who gave personally identifying  
16 information, so now we're down to 48.

17 MR. ROCHON: And we agree. We know the numbers. We  
18 can get them to your Clerk.

19 THE COURT: Just write them on a piece of paper.

20 MR. YALOWITZ: Okay, so now we're at 48.

21 THE COURT: All right.

22 MR. YALOWITZ: The defendants have four that were  
23 acceptable to them that the Court is willing to throw back into  
24 the mix. If the Court randomly selects four of the blank  
25 jurors to swap those out, so that we wind up with equal

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1 treatment -- in other words, I'm not being disadvantaged, if  
2 you take -- if you take four that both sides said, well, we  
3 don't have an objection to, but we don't want them and you  
4 knock those out randomly -- I mean you'll decide that -- then  
5 given the Court's process that we've been through, we don't  
6 then to have to go through my side of the process, because I  
7 had so many more acceptable jurors in the pool than they did,  
8 and --

9 THE COURT: Well, quite frankly, that's why I think  
10 this is pretty much an exercise in futility. Because the only  
11 real fair way to do it is to knock out the last four jurors and  
12 make these the 50, to the extent they're ahead of the last four  
13 jurors. Now, the last juror --

14 MR. ROCHON: Judge --

15 THE COURT: But the reality is is that we only went to  
16 186, okay. So I'm not sure why 190 needs to be in the mix at  
17 all, unless you want to substitute 190 for 186. But 186 is  
18 somebody that the defense wants, and so was 172 -- 172, I mean  
19 no 172 was somebody that the plaintiff wanted I think, and 186  
20 was somebody the defense wanted. 162 is -- 67 is somebody the  
21 plaintiff wanted, and 162 was somebody the plaintiff wanted. I  
22 would knock out those four to substitute these four to get 50.

23 MR. YALOWITZ: So then you're -- what you've done is  
24 you rewarded them.

25 THE COURT: How have I rewarded them? They want me to

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1 substitute these. I just knocked out one of the people they  
2 said they wanted.

3 MR. YALOWITZ: Yeah, you've also knocked out two of  
4 the people that I wanted.

5 MR. ROCHON: Your Honor, at one point this morning you  
6 had said that perhaps your approach would be to take the four  
7 that we said were acceptable that they did not object to, have  
8 four of theirs that --

9 THE COURT: The first four.

10 MR. ROCHON: Did not object. That would be the first  
11 eight.

12 THE COURT: Right.

13 MR. ROCHON: And then the question is what do we do  
14 for the next ten.

15 THE COURT: The next ten are going to be picked out of  
16 the wheel of the 50 that I had given you.

17 MR. ROCHON: That's acceptable to us. It also would  
18 be acceptable, if Mr. Yalowitz prefers, that the jurors that we  
19 have, for lack of a better phrase, rehabilitated or put back in  
20 be deemed now acceptable and not objected to. But he would of  
21 course get an equal number of acceptable that we don't object  
22 to, and you would then have 16 or I think if my numbers are  
23 right, that would be eight, eight and eight, and we'd have to  
24 fill out of the wheel for the last two.

25 THE COURT: I see what you're saying. So these people

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1 would qualify as someone that -- these three people would  
2 qualify as someone that you believe, you checked off were  
3 acceptable for voir dire.

4 MR. ROCHON: Yes.

5 THE COURT: And then I should add, so I do seven and  
6 seven.

7 MR. ROCHON: That's, I think we may have had four, but  
8 eight and eight was how it might be.

9 THE COURT: Well, four plus, four plus three is 7.

10 MR. ROCHON: I think you might have four in your hand  
11 25, 141, 154 and 190.

12 THE COURT: We would never get to 190.

13 MR. ROCHON: I see.

14 THE COURT: And in any scenario to get 50 is much more  
15 than we need, we'll never get to 190.

16 MR. ROCHON: I understand.

17 THE COURT: We probably wouldn't even get to 154, but  
18 or -- well, we will because we want --

19 MR. ROCHON: This does.

20 THE COURT: 186.

21 MR. YALOWITZ: Look, the problem here is he's gaming  
22 the --

23 THE COURT: I'll tell you what, why not just throw the  
24 three in the wheel.

25 MR. YALOWITZ: That's fine?

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1 THE COURT: Wait a minute.

2 MR. YALOWITZ: That's fine if -- look, if you --

3 THE COURT: I gave you 48 names, this would make 51  
4 okay.

5 MR. ROCHON: Right.

6 THE COURT: Why don't you just throw these three in  
7 there and we're going to spin the wheel, we're going to pull  
8 out.

9 MR. YALOWITZ: Can you give me three more put in the  
10 wheel too?

11 THE COURT: Everybody you asked for is in this wheel.  
12 Every single person you asked for is in this.

13 MR. YALOWITZ: But there are people that -- there are  
14 people that they improperly -- I mean, if we go through the  
15 Hill exercise on my side, I'm going to have a lot more than  
16 three.

17 THE COURT: You just said to me you didn't want to go  
18 through that.

19 MR. YALOWITZ: I didn't, but if I'm going to get gamed  
20 by --

21 THE COURT: I'm not gaming you. Tell me what you  
22 think you suggest. Are you suggesting throw people in the  
23 wheel?

24 MR. YALOWITZ: All I'm saying is give me three more  
25 and we'll be done, give me there are more to put in the wheel

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1 and we'll be done.

2 MR. ROCHON: I think what he's saying is he'd like to  
3 do his three best challenges to our four causes.

4 THE COURT: I understand that. I'm not sure why --

5 MR. YALOWITZ: My first three. We can go through in  
6 numerical order, do the first three.

7 THE COURT: If you'd like, I don't care, the bottom  
8 line --

9 MR. ROCHON: Your Honor?

10 THE COURT: Do you want to do that?

11 MR. ROCHON: I don't want to do it, but respect Mr.  
12 Yalowitz think he's being treated unfairly. I'll defer to the  
13 Court. Under any system, the four that we said were acceptable  
14 would go in, their first four that they said were acceptable  
15 would go in. We're talking about then are the next ten. Am I  
16 correct?

17 THE COURT: Yes.

18 MR. ROCHON: We said that right, thank you.

19 THE COURT: I mean I'm just talking about pulling ten  
20 out of the wheel of 50, approximately 50 people.

21 MR. ROCHON: And that wheel, just for the record will  
22 still have vastly more that he finds acceptable than we haven't  
23 objected to than us.

24 THE COURT: Right.

25 MR. ROCHON: But I mean he's still -- that wheel is

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1 going to be full of jurors that he found acceptable that we did  
2 not.

3 THE COURT: Right.

4 MR. YALOWITZ: I'd just like it a little more full.

5 THE COURT: I'm sure you would. But I mean, you know,  
6 look the bottom line is all you're entitled to is a fair and  
7 impartial juror, everybody --

8 MR. YALOWITZ: I agree with that.

9 THE COURT: Everybody on this list is qualified as  
10 that. So I'm trying to give you some more flexibility in terms  
11 of what peremptory challenges you might have, want to exercise.  
12 But the reality is I'm giving you more than you are really  
13 entitled to. You're not entitled to pick the jurors. You're  
14 entitled to challenge jurors. So you only get three of those.  
15 So, you know, I will -- if you want me to throw these back into  
16 the mix, I will throw these back into the mix. But at this  
17 point I'm still going to stick with the four and four, unless  
18 you want me to make it seven and seven.

19 MR. YALOWITZ: No, no. I want you to make it four and  
20 four.

21 THE COURT: Stick with the four and four.

22 MR. ROCHON: Right. We would prefer the seven and  
23 seven because now we I think overcome the challenges for cause,  
24 so we have jurors that we find acceptable that no longer have a  
25 valid change for cause.



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1 THE COURT: I mean, that's fine and dandy, but that  
2 just gives them a -- when you think about it, gives you some,  
3 but just gives them three more people.

4 MR. ROCHON: He could challenge three of ours and then  
5 we'd have seven and seven that -- if I have bad challenges for  
6 cause, he should make that argument, get three and we have 14  
7 and seven and seven, I'd be fine with that.

8 THE COURT: All right.

9 MR. ROCHON: Because that would be -- I think these  
10 are no longer valid challenges for cause, and Mr. Yalowitz  
11 should have the ability to challenge up to three of ours if he  
12 thinks that's they're bad challenges.

13 THE COURT: What do you want, Mr. Yalowitz?

14 MR. YALOWITZ: Look --

15 THE COURT: Otherwise, I'll just withdraw my four and  
16 four and just throw everybody in the wheel and what you're  
17 going to get.

18 MR. YALOWITZ: Let's do what you said, four and four,  
19 throw their additional three into the mix and we'll deal with  
20 the hardship issues and the cause issues if there are any.

21 THE COURT: I mean, I do have some concern about  
22 throwing their three in the wheel because at least they've  
23 taken the position that they object to those. Now whether I  
24 sustain the objection as a valid objection, if they come out of  
25 a different question, but it is unfair for me to put somebody

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1 in there on the same par as somebody who was objected to on the  
2 same par as somebody who wasn't objected to. I tried not to do  
3 that. I tried to be fair.

4 MR. YALOWITZ: Right. So the Court's proposal is take  
5 the three quasi rehabilitated jurors --

6 THE COURT: Throw them --

7 MR. YALOWITZ: -- into the mix and move on.

8 THE COURT: Right.

9 MR. YALOWITZ: Okay. I'm fine with that.

10 THE COURT: Mr. Rochon.

11 MR. ROCHON: We keep saying three. We had 25, 141,  
12 154 and 190.

13 THE COURT: 190 we never get to.

14 MR. ROCHON: I see.

15 MR. HILL: He withdrew his objection to that one, your  
16 Honor.

17 THE COURT: All right, so I'm willing to put the 51 in  
18 the wheel, spin the wheel, pull out ten names. Four, four, and  
19 ten are the people who we're going to voir dire initially. If  
20 it turns out they have a problem and there is a valid challenge  
21 for cause or the parties agree that they shouldn't sit, then  
22 we'll take one of the others who are in the audience and put  
23 them in that seat, until we have 18 people who are qualified to  
24 serve as jurors, and you will exercise your three peremptory  
25 challenges as to those 18.

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1 MR. ROCHON: Yes, sir. And the ones who will be  
2 brought back tomorrow will include everyone who is in the  
3 wheel?

4 THE COURT: All 51.

5 MR. ROCHON: Thank you.

6 THE COURT: Even though we're going to pull the 18  
7 now, I'm not going to say we already pulled the 18. I'm just  
8 going to spin the wheel with the 18 in it, and we're going to  
9 pull out the names at random and seat them in that order, and  
10 those are the first people who we're going to voir dire.

11 MR. ROCHON: Understood.

12 THE COURT: Okay. So that's what I'm going go do.

13 MR. YALOWITZ: Bear with me, your Honor. I just want  
14 to hand a note to Ms. Quirk about those two jurors I'm going to  
15 show Mr. Rochon.

16 MR. ROCHON: I think I already --

17 MR. YALOWITZ: Oh, did you give it?

18 THE COURT: Make sure.

19 MR. ROCHON: I gave her your last one.

20 MR. YALOWITZ: Okay, that's fine.

21 THE COURT: All right, so.

22 MR. YALOWITZ: So your Honor, your Honor?

23 THE COURT: Yes.

24 MR. YALOWITZ: I have a request and a question with  
25 regard to this process. The request is that if you could,

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1 after the ten random, if you could give us the next ten just so  
2 we understand today where the jury lies, it just will help us  
3 evaluate, it will help both sides. I'm sure Mr. Rochon would  
4 like that too.

5 MR. ROCHON: Yeah, you want to know who is in the box.

6 THE COURT: Right. I have no problem about.

7 MR. YALOWITZ: That's the first thing.

8 The second thing we would just like to know how the  
9 Court intends to deal with the foreperson.

10 THE COURT: They going to elect their own.

11 MR. YALOWITZ: That's all we want to know.

12 THE COURT: All right, okay. So what I'm going to do  
13 is I'm going to put these 43 names in the wheel. We're going  
14 to pull out 20. The first ten will be the ones who will be --  
15 well, the first ten we're going to put back into the wheel  
16 tomorrow with the other eight. I'm not going to put the  
17 additional ten in. We will spin the wheel. The order that  
18 they come out of the wheel tomorrow morning when they're here  
19 in our presence is the order they're we're going to seat them,  
20 and then we'll voir dire them. If they're all qualified, then  
21 we're going to have you challenge, exercise your peremptory  
22 challenges. If there are no challenges for cause -- if there  
23 are challenges for cause that I grant, then we'll refill that  
24 seat and until we have 18 people who are, there are no  
25 challenges for cause. So let's --

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1 MR. YALOWITZ: Your Honor, I apologize. It's which  
2 numbers are the eight that are --

3 THE COURT: Sure. The numbers are --

4 THE DEPUTY CLERK: 4, 11, 20, 24, 78, 93, 186, 192.

5 THE COURT: And that should be the --

6 MR. HILL: I'm sorry, could I have it one more time?  
7 I apologize.

8 THE COURT: Yes.

9 THE DEPUTY CLERK: It's not going to be the same  
10 order, but 78, 24, 20, 11, four, 186, 93, 192.

11 MR. ROCHON: Thank you.

12 THE COURT: All right. We're now in the electronics  
13 age.

14 MR. ROCHON: I like this.

15 MR. YALOWITZ: They use those wheels in the Clerk's  
16 Office too?

17 THE COURT: No. They have computerized.

18 THE DEPUTY CLERK: All right, 88, 28.

19 MR. ROCHON: 28.

20 THE DEPUTY CLERK: 28. 76. 85, 89, 48.

21 THE COURT: 48?

22 THE DEPUTY CLERK: 48 -- I'll read them all again at  
23 the end. 62, 44, 162, 37. So that is 88, 28, 76, 85, 89, 48,  
24 62, 44, 162, 37.

25 THE COURT: Then you wanted an additional ten. That's

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1 going to be the 18.

2 MR. ROCHON: Can I ask a stupid question? It's my  
3 specialty.

4 THE COURT: I have stupid answers too.

5 MR. ROCHON: I take it Ms. Quirk had put in the  
6 salvaged jurors before we spun the wheel.

7 THE COURT: Yes, yes. That added up to 43.

8 MR. ROCHON: Okay, thank you.

9 THE COURT: Because the number was 51.

10 All right. So those are the 18 jurors that we're  
11 going to put in the box. We'll randomly select them in that  
12 same manner in the wheel tomorrow when they're here, call the  
13 names and tell them to take a seat.

14 Now, what I'll do is we'll call ten more names, and  
15 then if we have to replace a juror, we'll replace them in that  
16 order, okay.

17 All right go ahead.

18 THE DEPUTY CLERK: 159, 1, 43, 96, 7, 95, 41, 14, 57,  
19 68. So that's 159, 1, 43, 96, 7, 95, 41, 14, 68, 57.

20 MR. ROCHON: Search I'm sorry.

21 MR. YALOWITZ: 68, 57 or.

22 THE COURT: 57, then 68.

23 MR. ROCHON: That's what I have 57 and --

24 THE DEPUTY CLERK: 57, then 68, excuse me.

25 MR. YALOWITZ: Probably an academic question.

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1 THE COURT: And as a matter of fact, I don't think any  
2 of ones we just argued about came out of the wheel.

3 MR. HILL: Yeah, your Honor, we, just so the record is  
4 clear you have not sustained those challenges for cause.

5 THE COURT: I have not.

6 MR. HILL: So in our view those should go in the front  
7 of the box. Because there was a challenge for cause made, your  
8 Honor has ruled that at this point it is no a valid challenge.  
9 So we think those three people that you added back in should be  
10 the next, part of the next group of six. Because otherwise  
11 what's happened is the plaintiffs have made a challenge for  
12 cause, you've overruled it and they've dropped out of the pool.

13 THE COURT: Well, they didn't drop out of the pool.  
14 They weren't randomly pulled out of the pool. And I never said  
15 that I would seat in the box people that were rejected. You  
16 had the opportunity to have them randomly selected, unless you  
17 want me to throw the four -- you can't have it both ways. You  
18 can't ask me to give you the four and then --

19 MR. HILL: I just want the record to be clear, your  
20 Honor.

21 THE COURT: The record isn't clear because I don't  
22 know what you're objecting to because you asked me to put the  
23 four in the box.

24 MR. HILL: Yes, your Honor.

25 THE COURT: You didn't ask me to put the -- well, you

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1 did ask me to put the seven in the box.

2 MR. HILL: We did.

3 THE COURT: But you never agreed that the seven that  
4 the people who were objected to were going to automatically go  
5 into the box. That was never agreed upon.

6 MR. HILL: I understand.

7 MR. YALOWITZ: I agree with that, your Honor.

8 THE COURT: All right. So if you had wanted that and  
9 you insisted upon that, then I would have randomized everyone.  
10 But I gave you the advantage to have in the box those people  
11 who you said you wanted, you wanted to voir dire. So I think  
12 at this point it's unfair for you to say that now you're  
13 disadvantaged by its process.

14 So, all right, so that's the way we're going to do it.  
15 We're going to notify the jury ten to 11:00. They're going to  
16 start calling those individuals, those 50 -- those 51  
17 individuals will be here tomorrow. When they come in I'll  
18 speak to them initially, and then we'll randomly put them in  
19 the box. Then I'll have some basic questions for them. If you  
20 have some questions that you would like me to ask of particular  
21 jurors, again don't give me anything extensive. I just want to  
22 have a little bit of dialogue with them. If there's something  
23 that's been raised by the questionnaire that you think ought to  
24 be explored, just give me have a quick letter before the end of  
25 the night and I'll look at that and see if it's appropriate.



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1 All right?

2 MR. ROCHON: Thank you, your Honor.

3 THE COURT: So we can move forward efficiently  
4 tomorrow. All right?

5 Yes, sir. Mr. Yalowitz.

6 MR. YALOWITZ: Your Honor, if the Court is ready to  
7 move to another topic?

8 THE COURT: Yes.

9 MR. YALOWITZ: Ms. Romeo has a logistical issue I'm  
10 hoping we can raise and dispose of promptly.

11 THE COURT: Okay.

12 MR. YALOWITZ: Thank you.

13 MS. ROMEO: So, your Honor, we have our lead  
14 translator here Rena Naman(phonetic), and I just wanted to make  
15 sure the Court is okay and approved with the set up that we're  
16 going to use tomorrow for trial. So I have a question which I  
17 think might make it very easy. Is the Court Reporter going to  
18 be sitting where the Court Reporter is today during the trial  
19 or is the Court Reporter going to be at the podium?

20 THE COURT: The Court Reporter is going to be where  
21 the Court Reporter is.

22 MS. ROMEO: Okay.

23 THE COURT: They're going to be -- you're talking  
24 about the podium on the side?

25 MS. ROMEO: Yes.

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1 THE COURT: They also utilizing that. You've asked  
2 them for not just daily copy, I understand you've asked them  
3 for real time. Is that not correct? Just daily copy?

4 MR. ROCHON: We did not ask for real time.

5 MS. ROMEO: No.

6 MR. YALOWITZ: I don't need real time either, but my  
7 translator needs it. So when we have translation, she -- they  
8 need -- told us they need real time and we've committed to  
9 that.

10 MS. ROMEO: We're going to have one computer with live  
11 note.

12 THE COURT: So what do you want?

13 MS. ROMEO: So -- well, the concern of the translator  
14 is that they need to see the witness in order to be  
15 interpreting. And the way it was set up on Friday was that  
16 there was a -- the interpreters would be in the back of the  
17 witness box. So we were hoping that potentially -- I'm not  
18 sure maybe we can just move the podium a little bit closer.

19 THE COURT: What are you going to do about a monitor?

20 MS. ROMEO: Well, what I was hoping is that we can  
21 maybe put a small folding table kind of on the side of the  
22 witness box and maybe just put the laptop right on top of  
23 there. This way we don't have to move any, if your Honor --

24 THE COURT: My suggestion would be this.

25 MS. ROMEO: Sure.

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1 THE COURT: My suggestion is that your interpreter  
2 stand --

3 MS. ROMEO: Okay.

4 THE COURT: -- between that podium and the witness  
5 box; that you put the monitor on top of the podium.

6 MS. ROMEO: Okay.

7 THE COURT: Because the juror has -- jurors have to  
8 see.

9 MS. ROMEO: Right.

10 THE COURT: Not so much the witness, but the  
11 interpreter because the interpreter's the one that's giving  
12 them the English, so.

13 MS. ROMEO: Sure.

14 THE COURT: It would be easier for the jurors to  
15 follow if they can see the interpreter. So the interpreter  
16 should stand right next to the witness. And if she has to look  
17 at the monitor, she can look at the monitor. I don't think the  
18 monitor will be in the way of the Court Reporter, since most of  
19 what the Court Reporter will be doing will be pretty much from  
20 that seat other than, you know, just going back and quickly  
21 within seconds doing something at the desk.

22 MS. ROMEO: Right. I understand, your Honor. And are  
23 we also able to just put where that chair is right there, a  
24 small table for the second laptop that the second interpreter  
25 will have and the --

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1 THE COURT: I'm not sure why you need a second laptop.  
2 Why do you need a second interpreter? You're going to use two  
3 interpreters at the same time?

4 MS. ROMEO: They're going to be switching off, your  
5 Honor.

6 THE COURT: Well, they can use the same monitor, I  
7 assume.

8 MS. ROMEO: Do you mind if I just have the interpreter  
9 address that?

10 THE COURT: I assume they're going to be listening to  
11 the witness, translating what the witness says. If they have a  
12 problem about what the witness says, they're going to see the  
13 monitor to verify it.

14 MS. ROMEO: Okay, so.

15 THE COURT: The one who is going to be doing that is  
16 the one who is translating for the jury.

17 MS. ROMEO: Right. So my understanding, your Honor,  
18 is there is going to be the one laptop with the live note, and  
19 then the second laptop is going to have -- they use it like a  
20 glossary so that they're able to -- it's what they use when  
21 they interpret. Second laptop is not going to be the live  
22 note.

23 THE COURT: Well, I don't -- I'm not quite sure what  
24 the two interpreters have to do -- I mean, you're only using  
25 one interpreter at a time, right?

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1 MS. ROMEO: Correct, correct.

2 THE COURT: Okay.

3 MS. ROMEO: Right, but they're going to switch off  
4 during the testimony because it's going to be a long day and  
5 this way --

6 THE COURT: No, I understand.

7 MS. ROMEO: So just -- right.

8 THE COURT: I'm just not quite sure why you need two  
9 lap tops, but.

10 MS. ROMEO: If you want to give me a moment I can  
11 inquire to see if there is a way we can put it on one laptop  
12 and see if that's possible.

13 THE COURT: Well, I would assume -- I'm not quite sure  
14 what kind of glossary you say is on the second laptop.

15 MS. ROMEO: It's a glossary that they use in the  
16 course the interpreting with the witness.

17 THE COURT: Of names or glossary of.

18 MS. ROMEO: I believe it's of words.

19 THE COURT: Words.

20 MS. ROMEO: I believe it's both. I believe it's both.  
21 But I can clarify that for the Court, because if we can  
22 condense it to one, I'm happy to make that work and do that.

23 THE COURT: Well, I would prefer one. We already have  
24 significant amount of laptops.

25 MS. ROMEO: I understand. So I propose that I'll

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1 clarify that with the interpreter team and see what we can do.  
2 We'll put the live note laptop on the podium and we'll have one  
3 interpreter just sitting and the other one standing and they'll  
4 just have to switch off, if that sounds like it will work for  
5 the Court.

6 THE COURT: That's fine. I'm used to that.

7 MS. ROMEO: Okay. And then there is a second issue,  
8 your Honor. The second issue has to do with splitting the  
9 costs of the interpreter.

10 THE COURT: Yeah, I didn't know what you agreed to.  
11 You submitted an order to me, but neither side signed that  
12 order, so I don't know what you want me to do. You agree or  
13 not agree?

14 MS. ROMEO: So here's the issue. The issue is we  
15 wrote to defendants back at the end of October.

16 THE COURT: Stop.

17 MR. HILL: We're fine.

18 MR. ROCHON: We'll sign.

19 MR. HILL: We'll sign for it.

20 MS. ROMEO: Then we don't have a problem.

21 THE COURT: Solved.

22 MR. YALOWITZ: Solved.

23 MS. ROMEO: Wonderful. Thank you, your Honor.

24 THE COURT: All right. Okay. Then let me -- we'll  
25 take a break in a little bit, ten minutes. Let me just move to

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1 some of the other substantive issues so we can get them out of  
2 the way. Just keep myself organized.

3 I've looked at the deposition designations. I don't  
4 have any problems with those designations to the extent they're  
5 consistent with my rulings. I don't see any legitimate  
6 objections to the designations so I'm going to allow the  
7 designations. If there's something that's really that I missed  
8 or something that is particularly prejudicial or in there  
9 that's inconsistent with the rulings that I made -- I looked at  
10 all these designations. They don't seem to be particularly any  
11 really particular objection or somehow inadmissible, so.

12 MR. HILL: We'll submit counter designations to the  
13 plaintiff's and we'll see if there is any disagreements.

14 MR. YALOWITZ: Thank you, your Honor.

15 THE COURT: Let me go to --

16 MR. ROCHON: Your Honor? I'm sorry.

17 THE COURT: Yes.

18 MR. ROCHON: Because there were two sets of -- there  
19 were two letters of designations, one that we sent on  
20 Palestinian officials and one on Mossab Yousef.

21 THE COURT: Yousef, Fayyad, Abu-Libdeh, Shqbu'a, Al  
22 Seek Cheek(Phonetic), Jadallah.

23 MR. ROCHON: Jadallah.

24 THE COURT: Those are the ones.

25 MR. ROCHON: I just want to make sure because there

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1 was two letters -- the only one that we were going speak to  
2 additionally today was one set of things as to Mossab Hassan  
3 Yousef, Mr. Satin was going to address that was not addressed  
4 last week, not to reargue last week, but there was one portion  
5 of the conversation he was going to address today, and --

6 THE COURT: And Yousef we already discussed in more  
7 detail, the testimony about torture and all --

8 MR. ROCHON: That was coming out.

9 THE COURT: That was out.

10 MR. YALOWITZ: That's out, your Honor.

11 Your Honor, as memory serves, the defendants have  
12 provided us with their counter designations sometime ago and if  
13 I could, just with the Court's permission, ask the defendants  
14 to take another look at those and let me know by Friday if  
15 there are any that they're withdrawing, then we can consult  
16 with them and if there is a problem we can let you know  
17 promptly.

18 THE COURT: All right.

19 MR. ROCHON: As long as it's not going to be this  
20 week's stuff, better to address it later in the week instead of  
21 today.

22 MR. YALOWITZ: So with the Court's permission I don't  
23 want to turn my back on the Court.

24 THE COURT: That's all right. You know when you might  
25 call --



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1 MR. YALOWITZ: Yeah, if we can -- it would be  
2 extremely helpful if we can hear from the defendants by the end  
3 of this week.

4 THE COURT: Okay. They said fine.

5 MR. ROCHON: Yeah.

6 MR. YALOWITZ: Okay, thank you.

7 THE COURT: All right. Let me go to -- all right.

8 I think we already addressed the plaintiff's motions  
9 particularly with regard to certain kinds of evidence and  
10 expert testimony. If we haven't, it's not clear, we can  
11 discuss it further. So really what I want to deal with the  
12 defendant's objections to six, basically six witnesses. Mr.  
13 Yalowitz, just remind me. I think there were one or two of  
14 these experts you say that you on probably would not call in  
15 your case in chief.

16 MR. YALOWITZ: So today as we speak there are three.

17 THE COURT: Okay.

18 MR. YALOWITZ: That would be Karsh and Addicott.

19 THE COURT: Karsh and Addicott would not be presented  
20 in your case in chief.

21 MR. YALOWITZ: Correct. And then as we discussed last  
22 week Marcus, we're cognizant of the Court's earlier comments  
23 and rulings. Based on that we've withdrawn him from our case  
24 in chief with the understanding that we reserve them for  
25 rebuttal.

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1 THE COURT: All right, okay.

2 MR. YALOWITZ: If needed, if needed, and if the Court  
3 thinks it's appropriate, I mean obviously.

4 THE COURT: We may have to come back to Marcus because  
5 you want to admit some statements that you say were printed in  
6 PA or PLO controlled media. And if I were to consider allowing  
7 that, you would have to establish of some witness who is going  
8 to testify that in fact this is what it purports to be. So I  
9 don't know if that's Marcus or if that's somebody else.

10 MR. YALOWITZ: Yeah, Marcus -- right, Marcus can -- I  
11 mean, I would have thought that the defendants would know what  
12 was printed in the newspaper they owned and what was shown on  
13 the television station that they owned, if we --

14 THE COURT: Two things. One or two things; that  
15 either it was in fact printed and, two, whether it was printed  
16 by them, so.

17 MR. YALOWITZ: So if we need to bring a witness who  
18 otherwise wouldn't testify in order to, in order to persuade  
19 the Court that these documents are authentic, which is I think  
20 what we're talking about here, then -- and we do it, then I  
21 think that some cost shifting would be in order here. Because  
22 to bring a guy in, fly him from Israel, have him get on the  
23 stand -- doesn't even need not be in the presence of the jury  
24 because these are questions for the Court -- have him say yes,  
25 my organization recorded this from PA TV, and therefore it's a

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1 real, you know, it's a document that is authentic, we watched  
2 it and this is our process and it's our business.

3 THE COURT: I assume that you already had witnesses  
4 you at least put on the list that you intend to have at this  
5 trial who were in a position to testify to that.

6 MR. YALOWITZ: That would be Marcus.

7 THE COURT: Including Marcus.

8 MR. YALOWITZ: That would be Marcus.

9 THE COURT: Okay.

10 MR. YALOWITZ: Right.

11 THE COURT: Then they shouldn't have to pay for Marcus  
12 if Marcus --

13 MR. YALOWITZ: If we're withdrawing him as a -- well,  
14 okay. Look --

15 THE COURT: It depends you're right, I will leave that  
16 up to you. Clearly to the extent that you want to either  
17 stipulate or that the defense represents to you that they have  
18 no objection to the admissibility of the document and can come  
19 in without objection and without any further foundation, then  
20 you can just put it in. Unless you have agreed that it can  
21 come in without any foundation, you're going to have at least  
22 lay a foundation for all your exhibits. And minimal foundation  
23 is as the law requires it is what it purports to be. So  
24 whatever you purport it to be you need someone to say where  
25 they got it from, and what it is.

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1 MR. YALOWITZ: Yeah.

2 THE COURT: And how they know what it is.

3 MR. YALOWITZ: Yeah, I think we can do that.

4 THE COURT: And that's the guidance that I can give as  
5 to what the foundation is if I'm going to admit it over  
6 objection.

7 MR. YALOWITZ: Right.

8 THE COURT: Okay.

9 MR. YALOWITZ: Okay.

10 THE COURT: If you meet that foundational requirement  
11 for the other issues that I would allow in, I don't think that  
12 there is other legitimate objections unless there may be some  
13 hearsay objections with regard to some other issues. But my  
14 attitude generally will be this, and then we can go back to all  
15 of these exhibits.

16 To the extent that you have something that you contend  
17 is a statement made by the PA or POL, its officials, or its  
18 agents on their behalf, and there is not any dispute about that  
19 statement or you've laid the proper foundation, it is probably  
20 going to come in. That's the guidance.

21 MR. YALOWITZ: I think we'll be able to address it  
22 with our existing witnesses. And then if there's a problem we  
23 can reserve the right to call Marcus as a foundational witness.

24 THE COURT: Well, as I say, I want you to be a  
25 prepared so we'll move forward efficiently and smoothly.

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1 MR. YALOWITZ: Very good.

2 THE COURT: Figure out what you are really going to be  
3 fighting about. To the extent that you, you know, there is an  
4 extensive fight about it that we haven't already addressed,  
5 let's raise it early so we don't waste the jurors' time with  
6 regard to that.

7 So then the question is -- I didn't know -- I didn't  
8 know where we ended up with Kaufman.

9 MR. YALOWITZ: Kaufman, we spoke about Kaufman. He  
10 is -- I thought -- my recollection, and I could stand  
11 corrected, my recollection is he's -- I described what he's  
12 going to do, which is summarize the convictions and summarize  
13 the facts found in the convictions, and provide the jury with  
14 some assistance in understanding where they can find the  
15 various attacks and the various convictions while I hand out  
16 binders of those convictions to the jury and have them walk  
17 them through it and --

18 THE COURT: Okay.

19 MR. YALOWITZ: -- my recollection is that the Court  
20 didn't have a problem with that.

21 THE COURT: Well, I think that the dispute at one  
22 point, I just don't remember how we resolved the dispute, at  
23 one point was whether or not there was going to be testimony  
24 about the fairness or quality of the Israeli military courts,  
25 and it was unclear, I forget -- we discussed, if they raised

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1 it, if they didn't raise it. I didn't know where we ended up.

2 MR. YALOWITZ: Again my recollection is, and this one  
3 I'm pretty sure -- I mean I can go back and check, but I'm  
4 pretty sure, is the Court said if I open that door, then the  
5 Court would give them a fair opportunity to respond. But that,  
6 in general, that kind of testimony and examination is out of  
7 bounds. Because the Court has ruled that these documents are  
8 admissible based on a reasonable evaluation of the system as a  
9 whole. And so unless the door is open, there is not going to  
10 be inquiry about torture or apartheid justice or any of that  
11 kind of any of that kinds of attacks on the military system.  
12 And at one point I think the Court said to Mr. Satin, which one  
13 of these guys was tortured that you think is actually innocent,  
14 and he didn't have any anybody like that.

15 THE COURT: You intend to raise this issue on  
16 cross-examination, in your opening or on your case in chief?

17 MR. ROCHON: No.

18 THE COURT: Okay.

19 MR. ROCHON: And just to be -- I give that answer, but  
20 now the explanation after just briefly. We, our position is  
21 that you ruled they can come in over our objections and our  
22 objections were on multiple bases, I don't need to repeat them  
23 here. Now the decision has been made to allow them in, the  
24 defense is not going to raise a separate challenge to their due  
25 process challenge, to the quality of the justice, challenge --

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1 THE COURT: Wait a minute. I ruled that what was  
2 going to come in? The only issue --

3 MR. ROCHON: The convictions.

4 THE COURT: Oh, yeah. But the only issue I'm  
5 addressing now right now is there was a question of whether or  
6 not I should allow this witness to testify about the quality of  
7 the Israeli military courts and other courts.

8 MR. YALOWITZ: We're not offering that testimony.

9 MR. ROCHON: And we're not going to open the door to  
10 it.

11 THE COURT: Okay.

12 MR. ROCHON: And, therefore, what I would expect  
13 pretty clean. I will say on Kaufman, though, the biggest issue  
14 is that we received the proposed redactions that -- of the  
15 convictions that he would seek to use on Saturday afternoon.  
16 It is I think close to a thousand pages. I didn't count them,  
17 but it's massive. We are going through those. We do have  
18 concerns about some of those redactions and we want to find --  
19 now is not the time -- I want to find the time to sit down with  
20 counsel to say where our concerns are, and then with the Court,  
21 and do it when the jury is not waiting. You know, this is a  
22 case that has a lot of paper as opposed to live testimony. So  
23 I apologize. I know it can be inconvenient to the Court, but  
24 it's the nature of this case of massive paper. We complained  
25 about it, the plaintiffs I'm sure feel it's necessary for the

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1 case. I'm not trying to get into who struck John. We now need  
2 to go through the redactions, and it's a lot, and we're not  
3 going to agree on it -- what a surprise -- and we'll try to see  
4 if we can work it out with them, but if not we're going to need  
5 the Court's attention on some of these. And so that is  
6 something we probably need to do before Kaufman testifies.

7 MR. YALOWITZ: Kaufman is going on tomorrow, your  
8 Honor.

9 MR. ROCHON: Well --

10 MR. YALOWITZ: They've had these, look --

11 MR. ROCHON: Wait, wait. We had these since Saturday,  
12 these proposed redactions. Let's just be clear, we've had  
13 these since Saturday. We're a little busy this weekend because  
14 we got their opposition on motion for summary judgment just  
15 before or after 10:00 p.m. Friday night, got a thousand pages  
16 of proposed redactions. It's not a surprise I haven't been  
17 through them by Monday morning. We have people working on it,  
18 we're going to get through it, but we need time with to go  
19 through it. I mean, if they want -- they said last  
20 Wednesday --

21 THE COURT: What do you want to do?

22 MR. ROCHON: I want to, after we go through them, see  
23 what the problems are, talk to you about them.

24 THE COURT: Okay. How do you want to do that?

25 MR. ROCHON: Well, I think one way to do it would be



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1 see how far we get today, pick a jury tomorrow. We can open  
2 tomorrow and then see if time, either after opening or before  
3 we begin Wednesday to go through --

4 THE COURT: Who is your first witness.

5 MR. YALOWITZ: First witness is my Meshulam Pearlman.  
6 He's an eye witness to one of the explosions.

7 THE COURT: All right. So --

8 MR. YALOWITZ: He's a sure --

9 THE COURT: -- it's not like we're going to get to  
10 Kaufman or these exhibits tomorrow.

11 MR. YALOWITZ: I expect Pearlman to be done in half an  
12 hour. We'll have Kaufman ready to go tomorrow.

13 THE COURT: Kaufman is your second witness?

14 MR. YALOWITZ: Second witness. So it's up to the  
15 Court if you, you know, want to --

16 MR. ROCHON: We're not going to be jammed this way.  
17 We're getting jammed here. This is --

18 THE COURT: Let me know what you want to address.  
19 Look, I'm not going to debate this, guys. I'm going to rule.  
20 You let me know what you want to address and when you want to  
21 address it.

22 MR. ROCHON: I'd like to address it before he  
23 testifies.

24 THE COURT: Well, then you better get it to me before  
25 he testifies.

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1 MR. ROCHON: Right. I'll do that. And we're working  
2 on it, but I just, you know, we may need some leeway from the  
3 Court.

4 THE COURT: You get some leeway, so just what's  
5 reasonable.

6 MR. ROCHON: Thank you.

7 MR. YALOWITZ: May I be heard on this before I move to  
8 the next topic?

9 THE COURT: If you want, but I think it is resolved.  
10 So I don't know why we need to debate this further.

11 MR. ROCHON: I had one more point on it. Mr. Kaufman  
12 I think is going to be testifying as a summary witness for the  
13 convictions, not as an expert I think.

14 THE COURT: They didn't qualify him as an expert.

15 MR. ROCHON: I don't know if they are either, but I'd  
16 like to know.

17 THE COURT: If you got an expert report, you can  
18 probably anticipate he's going to be an expert.

19 MR. ROCHON: I know, but previously they indicated  
20 he's coming as a summary witness because there was talk about a  
21 Daubert challenge. We don't object to him coming -- he's going  
22 to talk about the convictions and he's going to read them, but  
23 that's not expert testimony. He is just --

24 THE COURT: It depends. I don't know if the jury  
25 needs some expert testimony about how convictions are laid out

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1 and, you know, what the difference is between what a conviction  
2 would like look in Israel and what a conviction looks like  
3 in -- I don't know. They could use some somebody that's  
4 familiar with that process.

5 MR. ROCHON: If he's going to describe the process, we  
6 want to make sure he's not opining on the quality of the  
7 process, that's what --

8 THE COURT: I thought we went past that.

9 MR. ROCHON: I did too. That's why I was wondering  
10 whether he's really an expert or just someone who just says  
11 here's the convictions of these individuals.

12 THE COURT: Well, to the extent that he's going to  
13 explain to the jury, which would be beyond their lay person's  
14 knowledge, what these documents are and what form they're in  
15 and how they get generated, I would assume he has to be some  
16 kind of an expert to do that. I assume that when you accept  
17 somebody familiar with the process, you can do that. So to the  
18 extent -- I assume he's going to be qualified as an expert.

19 MR. ROCHON: Right. He was one of the experts we had  
20 a challenge to on Daubert and the Court never actually, because  
21 of the exchange about how they were going to use them, I don't  
22 know that you actually formally even ruled on that challenge.

23 THE COURT: Well, I don't see -- I don't think I've  
24 seen any basis -- if you say they're going to talk about the  
25 process of prosecution and conviction in a civilian and

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1 military court, I'm not sure I saw anything on that issue that  
2 made me believe that he is somehow unqualified to do so.

3 MR. ROCHON: It does depend what the plaintiffs are  
4 going to do with him. We don't have a good sense of that.

5 THE COURT: Assume that's all they're going to do with  
6 him.

7 MR. ROCHON: He's talking about the process and  
8 getting these convictions were obtained, it's one thing.

9 THE COURT: You say this is an indictment and this is  
10 a --

11 MR. ROCHON: Right.

12 THE COURT: -- judgment and the way you get the  
13 judgment is usually they either plead guilty or sometimes don't  
14 admit they're guilty but they admit facts and sometimes the  
15 Court decides on its own, you know, whether or not the person  
16 is guilty and they're not jurors here.

17 MR. ROCHON: Right. That sounds all fine, your Honor.

18 MR. YALOWITZ: Have you been in the prep sessions,  
19 your Honor?

20 THE COURT: I mean, this isn't rocket science, guys.  
21 You guys will have a jurors that say break this down for me and  
22 that's --

23 MR. ROCHON: If it's that, where the rub is going to  
24 hit the road and the issues are if they get into interrogation  
25 because that's where we have to be very careful that we're not

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1 opening the door back up to that which the plaintiff said they  
2 don't want to do and we said we would not open the door.

3 THE COURT: I'm not even sure that -- I don't remember  
4 anything that was coming in that was an interrogation -- well,  
5 I guess there were interrogations that said I, you know, I did  
6 this.

7 MR. ROCHON: Right. And the documents we have from  
8 the plaintiffs -- that's why we're going through them, so we'll  
9 see. Probably this is something we're going to want to need  
10 sometime from the court and we've got a process put in place we  
11 can talk bit hopefully tomorrow.

12 THE COURT: Well, I assume what has been redacted is a  
13 statement by non -- PA employee or a non official or agent of  
14 the PLO in which the person is the accusing a third person of  
15 committing a crime.

16 MR. ROCHON: Not all of those were redacted in our  
17 preliminary scan of them.

18 THE COURT: Okay.

19 MR. ROCHON: That's what we've talked about.

20 THE COURT: That's what I would -- if you want to move  
21 forward efficiently, I would prepare a second set of documents  
22 that redacts all of that.

23 MR. ROCHON: We can share our concerns with  
24 plaintiffs. They may not agree with us, but we can tell them  
25 what our first skim -- we looked at some of them this weekend.

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1 We've not looked at all of them. I have people doing that  
2 while we're here, so its not like it's waiting on me to get  
3 back to.

4 THE COURT: I mean, to the extent the person is a PA  
5 employee and the person is in some or official or stabbed that  
6 they are agent on behalf of the PLO or the PA, that person's  
7 statement can be admitted.

8 MR. ROCHON: Most of the plaintiffs have offered this  
9 on a declaration against penal interest theory as to the  
10 interrogations. As to -- I don't think any finding yet by the  
11 Court, and I don't think there could be that any of these  
12 people were speaking as agents of the PLO and they're being  
13 interrogated or questioned, because by the time you get  
14 arrested and charged with a crime, the agency relationship,  
15 whatever it was, is no longer primary. The primary  
16 relationship is you're facing criminal charges.

17 THE COURT: Not primary doesn't mean it's  
18 distinguished.

19 MR. ROCHON: I'm just saying I think the theory that  
20 these are coming in as agent's statement hasn't been made out  
21 nor was it a basis for your allowing it.

22 THE COURT: No, so but that wasn't the nature -- I  
23 mean we -- the nature of my indicating that they needed  
24 redaction was redactions of those individuals who profess that  
25 they were committing the crime and they want to say that an

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1 agent of the, or an employee of the PA or PLO also committed  
2 that crime.

3 MR. ROCHON: Those should be redacted.

4 THE COURT: Those should be redacted.

5 MR. ROCHON: We don't think all of them were. That's  
6 what we're going to talk to plaintiffs about. There is some  
7 other portion that we'll disagree about.

8 MR. YALOWITZ: So when Mr -- when the Court is done  
9 with Mr. Rochon, I want to address some of the things that the  
10 Court and he discussed.

11 THE COURT: Okay, go ahead.

12 MR. YALOWITZ: Okay, thank you. First of all, this  
13 redaction project took us quite a substantial effort. You'll  
14 see the redactions. They're very heavy. Enormous amounts are  
15 blacked out. I had assumed that the defendants understood when  
16 we were beginning trial and when the Court's ruling was and  
17 that they were actually looking at documents themselves to  
18 anticipate what should be redacted.

19 THE COURT: Well, I don't need to debate that further.  
20 Let's just move on.

21 MR. YALOWITZ: Thank you.

22 The second thing is I'm very concerned about Mr.  
23 Rochon trying to back door torture into this case by saying to  
24 the extent the convictions were --

25 THE COURT: It's not coming in.

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1 MR. YALOWITZ: Good, okay. And the third thing is we  
2 do think that these individuals were employees after their  
3 arrest. They stayed on the payroll. We didn't make the  
4 redactions on that basis, but, but we certainly agree with the  
5 Court's views on that, that relationship is not extinguished.  
6 So we'll reserve on that, but we did not make the redactions on  
7 that basis.

8 THE COURT: I'm not concerned about individuals who  
9 are individuals who were at the time that they committed the  
10 acts, that you establish were either employees or agents of the  
11 PLO during the relevant period of time. It doesn't matter to  
12 me that whether or not there is an agency relationship that  
13 continues beyond that. Because if the person said, if that  
14 person said while I was, and the evidence established that  
15 while I was a PA employee or an agent acting on behalf of the  
16 PA, I committed a crime and I committed the crime with the  
17 person who detonated the bomb or fired the gun, I don't have a  
18 problem with that. I don't have a problem with that.

19 I have a problem with a person who was involved  
20 directly in the crime who wants to point the finger at the PA  
21 or the PLO or at PA employee or a PLO agent official or anyone  
22 associated with them.

23 MR. YALOWITZ: Okay.

24 THE COURT: All right. That's the basic of this. The  
25 redactions should be consistent with that.



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1 MR. YALOWITZ: I believe that's how we approached it  
2 and if the defendants have a problem, then they better get  
3 ahold of us pretty fast.

4 THE COURT: All right, so.

5 MR. YALOWITZ: Thank you, your Honor.

6 THE COURT: Let's just finish up and then we'll take a  
7 break. Let's finish up on these experts.

8 I think generally I have no problems with Levitt  
9 testifying, if he is qualified to do so, with regard to the  
10 what he says the relationship is between the AAMB and Fatah and  
11 the funding mechanisms. If he is learned in this area he can  
12 state, you know, what he believes it to be and the basis for  
13 which he believes that to be. And if the defense wants to  
14 counter that with their own expert to say he's wrong, they can  
15 do so. Atacott --

16 MR. YALOWITZ: We've withdrawn Atacott.

17 THE COURT: Okay, good. Because I had a problem with  
18 Atacott. Marcus, Atacott, all right. So --

19 MR. ROCHON: Karsh.

20 THE COURT: Karsh is also off.

21 Eviatar, I'm not -- it's unclear to me what he's going  
22 to say. He's going to say in relationship to the PA and PLO  
23 involvement in terrorism, I'm not sure.

24 MR. YALOWITZ: So in large part Eviatar covers the  
25 same ground as Levitt, and that's why we have Levitt as a may

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1 call. Eviatar is extremely knowledgeable about structure of the  
2 PA's policies and procedures with regard to how they deal with  
3 terror. He is a 20 year field agent.

4 THE COURT: Well, tell me, give me an example what  
5 he's going to say.

6 MR. YALOWITZ: He's going to say the PA has a law that  
7 provides for the payment of money to anybody who is arrested  
8 for a crime of terrorism.

9 THE COURT: Okay.

10 MR. YALOWITZ: So that's a policy that they have and  
11 that he's going to explain, going to show how the law, and  
12 explain who it works. As an example of what he's going to do,  
13 he's going to say I've studied the PA and the PLO and Fatah for  
14 many years and they treat themselves interchangeably.

15 THE COURT: And he's basing that on what?

16 MR. YALOWITZ: He's basing that on evidence in the  
17 case, documents that have been --

18 THE COURT: Give me an example.

19 MR. YALOWITZ: There is a deposition testimony that  
20 Fatah doesn't have its own money, they rely completely --

21 THE COURT: Talking about the money trail of how to  
22 fund.

23 MR. YALOWITZ: Right, right. So he's going to say  
24 here's some documents that are from the PA's intelligence files  
25 that show that they knew that these particular individuals were

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1 terrorists, and then here's another document that shows the PA  
2 approving payments to those individuals; follow the money  
3 trail.

4 THE COURT: All right spoke.

5 MR. YALOWITZ: So those are the kinds of things he's  
6 going to do. He's going to also going to talk about the PA's  
7 material support for the Al Aqsa Martyrs Brigades, which is in  
8 the form of money and weapons.

9 THE COURT: He's going to base that on what?

10 MR. YALOWITZ: Again on the documents that we've just  
11 been discussing, government reports, convictions, the PA's own  
12 intelligence files like that. He's also going to talk about  
13 the PA support for Hamas, and in particular the support  
14 material support for the Hebrew University bombing, which was a  
15 Hamas attack, again using convictions, policies, procedures.

16 THE COURT: What's going to be the nature of the  
17 evidence of the material financial support for the two Hamas  
18 for the Hebrew University bombing?

19 MR. YALOWITZ: I don't think they provided financial  
20 support to Hamas.

21 THE COURT: Okay. That's what I thought you said.

22 MR. YALOWITZ: No. They provided some financial  
23 support to the bomber. They gave the bomber some money, but  
24 they didn't give the --

25 THE COURT: Okay, okay. I just misunderstood what you

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1 just said.

2 MR. YALOWITZ: They didn't cut a check, you know,  
3 Hamas, pay to the order of Hamas.

4 THE COURT: Well, I have a question mark next to that  
5 not so much because I think that the testimony in general is  
6 inadmissible, but I'm not quite sure whether everything you  
7 said he's going to testify to is admissible or all of the  
8 documents that you say he's going to rely upon are going to be  
9 before this jury. But I don't -- I'm not going to preclude him  
10 as a witness, but I will hear specific objection with regard to  
11 where he goes with this. I mean, obviously, you know, there is  
12 enough out there so he can, if he's qualified, he could talk  
13 about, you know, payments and the policy of payments. And, you  
14 know, both sides can debate why payments were made and that  
15 sort of thing. So I don't have any problems in general, but  
16 we'll see more specifically. So I'm not going to preclude him  
17 as a witness.

18 MR. YALOWITZ: Thank you, your Honor.

19 THE COURT: All right. Shrenzel, I don't -- give me  
20 the primary testimony that you expect.

21 MR. YALOWITZ: Sure. So Shrenzel's got two things.  
22 He does -- first of all he takes those policies that we were  
23 talking about and looks at how they were applied in the, in six  
24 of the seven attacks, so payments to people convicted of  
25 terrorism.

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1 THE COURT: Is this going to be, is his analysis going  
2 to be based on evidence that's already going to be before this  
3 jury?

4 MR. YALOWITZ: Correct, correct.

5 THE COURT: All right. In the form of?

6 MR. YALOWITZ: Payroll records, intelligence files.  
7 It's very granular, take the jury through who participated in  
8 the attack, which is established by the convictions, and how  
9 did the PA treat them before and after they were arrested and  
10 convicted.

11 THE COURT: All right. And is there something you  
12 anticipate that he's going to rely upon that is not going to be  
13 evidence in this case before this jury?

14 MR. YALOWITZ: I mean, obviously, an expert has some  
15 things that they rely on, but I'm not --

16 THE COURT: Depends on what he has to say.

17 MR. YALOWITZ: Yeah. I mean, I'm not -- I don't think  
18 that we're going to have a problem with, okay, we didn't get  
19 something in because it was hearsay and now he's going to, you  
20 know, transmit it to the jury. We don't need to do that.

21 THE COURT: And is he primarily going to analyze the  
22 evidence before the jury with regard to the incidents and their  
23 connection to the PA or PLO?

24 MR. YALOWITZ: Correct, correct.

25 THE COURT: All right.

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1 MR. YALOWITZ: There is a second thing that he brings,  
2 your Honor, which is these police magazines. Again, it goes to  
3 the scope of employment.

4 THE COURT: You want him to go through the police  
5 magazines, tell them what they are, that sort of thing, he has  
6 familiarity, that kind of thing.

7 MR. YALOWITZ: Right.

8 THE COURT: And is he going to opine that there is  
9 these police magazines and/or other public printed material is  
10 put out by the PA or the PLO?

11 MR. YALOWITZ: Correct, which I, until this weekend, I  
12 didn't think there would be a factual dispute about that, but  
13 now --

14 THE COURT: There may be. But my attitude would be, I  
15 don't see in the abstract any reason to exclude him as a  
16 witness. If there's something that appears that he's getting  
17 ready to testify to he's not qualified to testify to, or no  
18 basis for or legitimate professional analysis, then I'm willing  
19 to hear the objection, but in general, I'm not going to exclude  
20 him as a witness.

21 MR. YALOWITZ: Understood. Thank you, your Honor.

22 THE COURT: All right, yes sir.

23 MR. SATIN: Can I be heard, your Honor, with respect  
24 to Mr. Shrenzel that Mr. Yalowitz and the Court just discussed?

25 THE COURT: YES.

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1 MR. SATIN: I'll start with Mr. Shrenzel. And what  
2 Mr. Yalowitz said in response to the question, what's his  
3 primary testimony, I think Mr. Yalowitz said to show how those  
4 so-called policies are applied.

5 But really what he's doing is he's taking the evidence  
6 in the case, to the extent it gets admitted, and he is just  
7 opining, based on that the defendants are liable for these  
8 particular attacks. In other words, he is just summarizing  
9 documents that are going to be in front of the jury, if they  
10 are, which as the Court has said many times, which we agree,  
11 this is not rocket science.

12 THE COURT: But have a witness come and summarizing  
13 evidence from the jury, he could make a chart, he can, you  
14 know, plenty of time witnesses are summary witness.

15 MR. SATIN: That's fine. And what I'm talking about  
16 now is whether or not this witness is going to be cloaked as an  
17 expert witness. If they want him as a summary witness, then  
18 that's a separate conversation for us to have. Certainly the  
19 evidence has to be admissible -- which some of these things  
20 that I think he's going to be talking about are not admissible,  
21 and he still has to have the basis for knowledge about those  
22 particular exhibits to give that summary testimony, which I  
23 don't know that he has. These aren't documents that he has  
24 personally reviewed. They were just given to him and he says  
25 this is what they said. But at least -- but here's the danger

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1 with Mr. Shrenzel. His report is not -- it's a summary of  
2 documents, but on top of that it's his conclusion that the  
3 defendants are liable. And that's why we're concerned about  
4 his testimony that they are, the plaintiffs are seeking to  
5 invade the province of the jury by having this person who is  
6 going to be, according to them, cloaked as an expert based on  
7 his intelligence and experience say I've looked at the  
8 documents in this case and I conclude that the defendants are  
9 liable, and that should not happen in this case.

10 THE COURT: Well --

11 MR. SATIN: Especially when the evidence at issue is  
12 not so complicated that they can't make their mind up on their  
13 own.

14 THE COURT: I am less concerned about that, and I'll  
15 look at his report more thoroughly. I'm less concerned about  
16 that because the reality is is that, you know, if his analysis  
17 and conclusions are based primarily and not exclusively on the  
18 evidence that's before this jury, that you have a full  
19 opportunity to argue he's a quack, doesn't know what he's  
20 talking about, and you have an expert to say just the opposite,  
21 and you have dueling experts. Or even -- and I clearly intend  
22 to give the jury an instruction that it is not -- they need not  
23 accept the expert's opinion; that they have to make the final  
24 decisions and ultimate determinations in this case, and  
25 consider the opinions of experts and give it whatever weight



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1 they deem is appropriate.

2 So I have less of a fear that somehow, one, that  
3 simply because he's going to opine upon the ultimate issue that  
4 that necessarily makes it automatically inadmissible and, two,  
5 whether or not that it will invade the jurors' province, which  
6 I'm sure you want to emphasize to the jury that it is their  
7 province. And I instruct them as to it's their province. And  
8 the bottom line is that regardless of what he says or your  
9 expert say they have to make that determination and decide  
10 whether or not it is a logical reasonable conclusion to draw  
11 consistent with the experts, or whether or not the evidence  
12 supports a different conclusion. So I'm not particularly  
13 persuaded that that, in and of itself, should preclude his  
14 opinions in this case.

15 MR. SATIN: Well, a couple things. First of all, I do  
16 want to say that there has been some discussion of the police  
17 magazines witness second opinion he's going to talk about. I'm  
18 not going to address that now, but I do want the Court to be  
19 aware that for two independent reasons that we discussed later  
20 number one the language in those magazines does not fit within  
21 the parameters of what is proper to be for a jury and, second,  
22 that those magazines are not in fact statements of a PA or PLO.  
23 So certainly he should not be allowed to testify about those  
24 things, if and when it is shown, and we believe we're already  
25 shown in our letter, but we can argue to the Court about it,

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1 that they don't come in independently.

2 THE COURT: Who do you contend generates these  
3 documents other than the PA or PLO?

4 MR. SATIN: I'll defer to my colleague to address the  
5 issue if the Court would like to hear about it now.

6 THE COURT: I just want to know the answer to that  
7 question, who outside the PA and PLO generates these?

8 MR. HILL: There are a number of people in Palestine,  
9 as your Honor, would suspect, that have opinions, and only one  
10 of the magazines in issue is actually produced by the PA or  
11 PLO. The others were not.

12 THE COURT: All right. Well, I don't know, to the  
13 extent that they say they have evidence that it is produced by  
14 the PLO. Obviously if they have such evidence, they're allowed  
15 to offer it and you're allowed to offer evidence that  
16 contradicts that. But if there is no legitimate evidence by a  
17 witness that could lead a reasonable jury to conclude that the  
18 PLO the PA or an arm or agent of the PLO or PA generates this  
19 information, then it cannot come in.

20 MR. YALOWITZ: Your Honor, I don't think Mr. Hill  
21 answered the Court's question, which was who does produce  
22 these.

23 THE COURT: You contend that there is someone else  
24 other than the PA?

25 MR. HILL: Yes. The plaintiff's burden, as you said,

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1 to lay the foundation for them to come in as our statements.  
2 They're not going to able to do that.

3 THE COURT: Do you contend there is someone else other  
4 than the PA who --

5 MR. HILL: Publishes magazines in Palestine? Yes,  
6 your Honor.

7 THE COURT: Who do you contend that to be?

8 MR. HILL: Well, the people that reported, produced  
9 the magazines, got their own name and their own banner, some  
10 group in Gaza that published one of them, and another one  
11 purports to be some other independent organization.

12 THE COURT: Okay. Well, you know, as they I say to  
13 the extent, I don't know what the evidence is that they wish to  
14 offer that it is a PLO or PA generated document. If they offer  
15 legitimate evidence that it is a PA or PLO generated document,  
16 then it is an issue for the jury to resolve. So we'll see  
17 where we go with that.

18 Let me take a short break, let me give the Court  
19 Reporter a break. We'll take a ten minute break.

20 MR. YALOWITZ: Thank you, your Honor.

21 (Recess)

22 (Continued on next page)

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1 THE COURT: Once again, it is up to the defense  
2 whether they want you to go through that process.

3 MR. YALOWITZ: I understand.

4 THE COURT: If it is not necessary, if that is the  
5 case, if you could establish that --

6 MR. YALOWITZ: We will.

7 THE COURT: -- find out whether they have an  
8 objection.

9 I didn't have a real problem with 337, but I wasn't  
10 exactly sure what it was and where it came from.

11 Mr. Yalowitz, can you sort of identify that? It seems  
12 to be some sort of recitation.

13 MR. YALOWITZ: Bear with me, your Honor. I just want  
14 to consult on this.

15 (Pause)

16 You know, we are not going to use 337 based on the  
17 summary judgment. Sorry about that, your Honor.

18 THE COURT: That is all right. So we could pass that.

19 Now, which takes me to 339 and similar documents.  
20 Although this purports to be something from the Israel Ministry  
21 of Foreign Affairs, and there are similar documents, I'm not  
22 quite sure what it is you contend these are and I'm not sure  
23 that I could make a finding that these are somehow some  
24 government reports that are based on some government  
25 investigation. It just seems to be a summary recitation of

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1 someone's position, opinion or known fact, which I can't tell  
2 which, that the information that is stated here is somehow  
3 true. I'm not quite sure what this is supposed to read.

4 MR. YALOWITZ: I just need one second, your Honor.

5 THE COURT: Sure.

6 MR. YALOWITZ: I am going to be able to find this.

7 THE COURT: I have problems with all of those  
8 documents that you retrieved from both the Israel Ministry of  
9 Foreign Affairs and the Prime Minister's department. It is  
10 just making statements about events and there is no basis for  
11 why these statements are being made.

12 MR. YALOWITZ: Sure. So with regard to the -- let me  
13 start with the one about Zinni list, which is 354, your Honor.

14 THE COURT: 354?

15 MR. YALOWITZ: Yes.

16 So this is a statement by the government of Israel  
17 about the activities of the government of Israel. So it is a  
18 public report.

19 THE COURT: OK.

20 MR. YALOWITZ: I have somebody who can look at it and  
21 say, you know, I've checked and it is what it purports to be.  
22 And so this document says, "In December 2001, Israel presented  
23 U.S. peace envoy Anthony Zinni with a list of 33 most wanted  
24 terrorists, requesting their arrest by the Palestinian  
25 authority." That's a statement by the government of Israel

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1 about the government of Israel's activities.

2 THE COURT: All right. So they gave this report to  
3 Zinni?

4 MR. YALOWITZ: Yes.

5 THE COURT: You have to give me more detail about  
6 Zinni. You want to show that they were put on this list, and  
7 then there is going to be some testimony that was given to  
8 Yasser Arafat?

9 MR. YALOWITZ: Yes. So there is video of Yasser  
10 Arafat being asked about the Zinni list. And then he says,  
11 yeah, I got it and I arrested some of the guys and other guys I  
12 didn't arrest and maybe I will, or whatever he says. He  
13 extemporizes about it, but he admits he got it on video. There  
14 is not going to be -- I don't know what they are going to do.  
15 It looks like Yasser Arafat. Maybe he says Yasser Arafat is  
16 like those Elvis lookalikes. Maybe it was an actor pretending  
17 to be Yasser. I don't know.

18 Then this next sentence, "The list was given by Zinni  
19 to the Palestinians." That doesn't come in, I guess, if we are  
20 going to be rigid about it because that's about what Zinni did.

21 THE COURT: But if you say you have an independent  
22 statement on videotape by Yasser Arafat saying that he received  
23 the list --

24 MR. YALOWITZ: He did. I do.

25 THE COURT: I'm so sure why we are arguing about

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1 whether or not that is a legitimate video or whether or not he  
2 in fact -- or they can even debate about whether or not he  
3 really did have the list or didn't have the list. But I don't  
4 see that that goes to admissibility if that is the only purpose  
5 of this one document.

6 MR. YALOWITZ: Then the final sentence, the final  
7 statement that I am interested in is: "Five of these most  
8 wanted terrorists have been arrested by Israel during operation  
9 Defensive Shield." Then it lists the names.

10 THE COURT: OK.

11 MR. YALOWITZ: And what do you know? Two of the names  
12 are guys who between the time that they gave the list and  
13 between the time that Israel finally arrested them perpetrated  
14 attacks in our cases.

15 THE COURT: OK.

16 MR. YALOWITZ: So that's why I want that document, and  
17 it is a statement by Israel about Israel's activities.

18 THE COURT: Yes.

19 MS. FERGUSON: Your Honor, first, this document is  
20 being offered apparently for the truth of the matter that the  
21 PA somehow had notice that these particular people were on the  
22 Zinni list, and there is no evidence of what names were on the  
23 Zinni list.

24 THE COURT: Well, he says he has a video of Yasser  
25 Arafat saying he got the Zinni list. Are you disputing that

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1 there is evidence that Yasser Arafat admitted he had the Zinni  
2 list?

3 MS. FERGUSON: There is no further discussion of whose  
4 names are on the list.

5 THE COURT: That is a different question. The  
6 question is whether is there any genuine dispute that there is  
7 evidence that Yasser Arafat admitted that he received something  
8 referred to as the Zinni list? I just wanted to know --

9 MR. HILL: My recollection is they said he received a  
10 list from General Zinni. The issue is who is on the list. And  
11 there is no evidence of the content of the list apart from this  
12 hearsay document, and it's being offered to prove the content  
13 of the list. That's the basis for the hearsay objection.

14 THE COURT: But I don't understand what you contend he  
15 got, if this providing you with the Zinni list, what you  
16 contend he got other than this list.

17 MR. HILL: He said he got a list from General Zinni.  
18 There is no evidence of who was on the list that was given --

19 THE COURT: Isn't there a reasonable inference for a  
20 reasonable jury to conclude that he got -- if they say this is  
21 what the Zinni list is, that one can infer that he got this  
22 list?

23 MR. HILL: Well, setting aside the relevance issue, I  
24 understand the relevance of it. This is hearsay. This is  
25 being offered to prove the content of the list, which will not



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1     come into evidence. This is being offered to prove that in  
2     fact the list contained these names. It is offered for the  
3     truth of the matter asserted as to the content of the list.  
4     That is why it is hearsay.

5             THE COURT: And you --

6             MR. HILL: It is not based on an Israeli government  
7     investigation or anything.

8             THE COURT: No. I'm going to overrule that objection.  
9     I think that if they have evidence that Yasser Arafat said he  
10    got the Zinni list, I think it is appropriate for the jury to  
11    know who the Israel Ministry of Foreign Affairs says was on  
12    that list and whether or not there is some reasonable logical  
13    conclusion to reach that Yasser Arafat got something different  
14    than this. It is up to the jury.

15            The question isn't whether or not -- I'm not even sure  
16    it qualifies as hearsay. The question is not whether or not  
17    what's on this report -- activities on this report in fact  
18    happened. The question is simply whether or not these were the  
19    names that were listed on the list that he got.

20            Now, do you have some reasonable argument to argue to  
21    the jury that he got some other list with a different set of  
22    names, then I think the jury is entitled to hear that.

23            MS. FERGUSON: Your Honor, in addition, it is multiple  
24    levels of hearsay. It is the Ministry of Foreign Affairs  
25    communicating what they heard from Israeli security forces

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1 about this list that no one ever --

2 THE COURT: I know. But it takes it out of the realm  
3 of hearsay, at least those layers of hearsay by Yasser Arafat  
4 admitting that he got a Zinni list. I mean, that is like  
5 saying that --

6 MS. FERGUSON: It is still an out-of-court statement  
7 being offered for the truth. It doesn't matter that --

8 THE COURT: The truth of what.

9 MS. FERGUSON: Well, apparently, it is being offered  
10 for the truth that there was a Zinni list that had 33 names  
11 that included --

12 THE COURT: Well, we know there was a Zinni list  
13 because you admit there was a Zinni list.

14 MS. FERGUSON: But I don't know anything about the  
15 content of the Zinni list.

16 THE COURT: No, I disagree with that. I think it is  
17 your burden. If you contend that there was something different  
18 on the Zinni list, then you should be able to say so. They say  
19 that this reflects, consistent with what -- if Yasser Arafat  
20 had to say that he got the Zinni list, I might have excluded  
21 it. But if they have evidence of Yasser Arafat saying he got  
22 the Zinni list, I think you have the burden of convincing the  
23 jury there is some other Zinni list other than this one, if  
24 that is your legitimate position, and I don't know that is your  
25 legitimate position.

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1           So, no, I don't think that this is hearsay simply  
2 because they list a list of names. The only question is were  
3 these names on the Zinni list or weren't they on the Zinni  
4 list. They say this is the Zinni list. And Yasser Arafat said  
5 I got the Zinni list. So it is logical, common sense. If you  
6 have some other evidence that disputes that, I would -- I think  
7 it should go to the jury.

8           But I agree with them. Initially, I didn't know  
9 exactly how it was connected. But if they are going to connect  
10 this through an admission by Yasser Arafat that there is such a  
11 thing as the Zinni list -- and I doubt it -- I think it is  
12 admissible to say, OK, the Minister of Foreign Affairs said  
13 that they gave a Zinni list to the PA and this is the list that  
14 they gave them. It doesn't give a recitation of a whole bunch  
15 of events. It just says that these people are wanted. I don't  
16 think that that is --

17           MS. FERGUSON: Your Honor, can we go back to 339?

18           THE COURT: Yes.

19           MR. YALOWITZ: Actually --

20           THE COURT: 339, 350, 354, I still have some problems  
21 with those documents, or issues.

22           MR. YALOWITZ: All right. So 339 and 954, which -- is  
23 it 954?

24           THE COURT: 954?

25           MR. YALOWITZ: Yes. So 339 and 954, 954 is sort of a

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PowerPoint presentation that goes with 339.

THE COURT: OK. Because it says "DVD." I just don't know what the content of the DVD is.

MR. YALOWITZ: I will explain it.

So those two documents are announcements of the seizure of funds from various individuals implicated in terrorism.

THE COURT: OK.

MR. YALOWITZ: So one of those individuals is Naef Abu Sharkh.

THE COURT: Unfortunately, I don't see that name on 339. Is that on 339?

MR. YALOWITZ: He is on the second-to-last page, your Honor.

THE COURT: The second-to-last page?

MR. YALOWITZ: Yes. Personal bank accounts from which fund were confiscated during --

THE COURT: Tell me where. I don't see the name.

MR. YALOWITZ: So I am on page 4 of 5 of the --

THE COURT: Page 4.

MR. YALOWITZ: -- of the ECF.

THE COURT: Yes.

MR. YALOWITZ: Then it says, "Personal bank accounts from which funds were confiscated during the operation" in bold type, kind of a third of the way down the page.

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1 THE COURT: "Types of bank accounts from which funds  
2 were confiscated."

3 MR. YALOWITZ: Maybe we are looking at different  
4 things.

5 THE COURT: I have 339 it is from.

6 MR. YALOWITZ: Yes, 339. Should we test out the Elmo?  
7 I can put it up on the Elmo here.

8 THE COURT: You can try. My document is titled,  
9 "Operation for the Confiscation of Terror Funds background."

10 MR. YALOWITZ: Correct.

11 THE COURT: The first name that is bolded is Ahmed  
12 Sa'ari Hussein.

13 MR. YALOWITZ: Right. So now we flip -- I am just  
14 going to flip one, two, three more pages.

15 THE COURT: OK.

16 MR. YALOWITZ: And we've got a bold item that says  
17 "Personal bank accounts from which funds were confiscated  
18 during the operation."

19 THE COURT: Yes. I see that. OK.

20 MR. YALOWITZ: And then one of the guys is this Naef  
21 Abu Sharkh.

22 THE COURT: OK.

23 MR. YALOWITZ: And he is implicated by this document  
24 in the June 19, 2002 suicide bombing.

25 THE COURT: Which is?

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1 MR. YALOWITZ: Which is one of the attacks in our  
2 case.

3 THE COURT: June 19th -- which attack?

4 MR. YALOWITZ: Mandelkorn.

5 THE COURT: Mandelkorn, right.

6 So you want this document to prove what?

7 MR. YALOWITZ: To prove that this individual, who  
8 other evidence indicates was a terror-financing individual  
9 associated with Al-Aqsa Martyrs Brigades was implicated in this  
10 attack.

11 THE COURT: You don't have any other evidence that  
12 this person was involved in this attack?

13 MR. YALOWITZ: He was liquidated. So this is the --  
14 he was liquidated after this but this is what we have --

15 THE COURT: He's not a PA or PLO employee?

16 MR. YALOWITZ: He was a PA or PLO employee, and they  
17 shifted him from the security forces to some other mysterious  
18 detail. But --

19 THE COURT: So what is the evidence that this is based  
20 on that he was involved in this attack?

21 MR. YALOWITZ: We don't have the underlying evidence.

22 THE COURT: All right. That's what I am assuming.

23 MR. YALOWITZ: I understand that.

24 THE COURT: Who says this and why is the question that  
25 I have to ask?

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1 MR. YALOWITZ: Look, the only thing I have on this  
2 document and I would like this document in --

3 THE COURT: I understand.

4 MR. YALOWITZ: Of course. What I have is it's like an  
5 OFAC press release. So OFAC says, you know, we seized a bank  
6 account of a guy who was financing terror, and if he disagrees  
7 he can show up and appeal. And it says that in the press  
8 release in the PowerPoint. They only have a right of appeal.  
9 This was conducted by the Attorney General and the IDF and the  
10 security --

11 THE COURT: You don't have any of that?

12 MR. YALOWITZ: I'm sorry.

13 THE COURT: You don't have any of that?

14 MR. YALOWITZ: No. No. We do. It is in 954, it says  
15 that.

16 THE COURT: 954 is what? You have to give me the  
17 context of 954.

18 MR. YALOWITZ: OK. So 954 is a more detailed  
19 presentation that was given together with 339 --

20 THE COURT: So, again, do you have a witness who can  
21 tell me where it comes from and what it is supposed to be?

22 MR. YALOWITZ: Yes.

23 THE COURT: Where does it come from and what is it  
24 supposed to be?

25 MR. YALOWITZ: It is a presentation given to the press

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1 about the results of this investigation and seizure.

2 THE COURT: And given by whom?

3 MR. YALOWITZ: Given by the Ministry of Foreign  
4 Affairs.

5 THE COURT: It is like a press conference?

6 MR. YALOWITZ: Like a press release.

7 THE COURT: A press release?

8 MR. YALOWITZ: Right. Like if, you know, Eric Holder  
9 made an announcement, we seized the bank account of this guy  
10 who is a terrorist.

11 THE COURT: Let me say, this is a DVD. I'm not sure,  
12 is it a video --

13 MR. YALOWITZ: No.

14 THE COURT: -- or is just a document?

15 MR. YALOWITZ: It's a PowerPoint presentation. And it  
16 is just -- the formatting is kind of weird, and I'm sure we can  
17 get it printed out and we can look at it.

18 THE COURT: And you want it to show that they  
19 basically seized his funds as being involved in this attack?

20 MR. YALOWITZ: Correct.

21 THE COURT: OK.

22 MR. YALOWITZ: It links -- this guy, who is a known  
23 Al-Aqsa Martyrs Brigades financier to our attack.

24 THE COURT: So what is the evidence that links him to  
25 this attack?



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1 MR. YALOWITZ: This is my evidence.

2 THE COURT: What is the evidence that they rely upon  
3 that links him to the attack?

4 MR. YALOWITZ: It is not disclosed. They did not  
5 disclose this.

6 THE COURT: So you don't know why they say he is  
7 involved?

8 MR. YALOWITZ: Correct. Just as sometimes we don't  
9 know why OFAC seized -- they may have had their own reasons for  
10 not disclosing the evidence. This is the evidence I have. I  
11 don't have --

12 THE COURT: You don't have evidence that he is  
13 involved in this attack?

14 MR. YALOWITZ: That I --

15 THE COURT: And he is your key link to the PA and the  
16 PLO at this point?

17 MS. FERGUSON: Your Honor, if I could just --

18 MR. YALOWITZ: He is -- he was the only link to the PA  
19 and the PLO. Your Honor ruled on summary judgment that that's  
20 not enough to do vicarious liability.

21 THE COURT: Right.

22 MR. YALOWITZ: I still want the document in because he  
23 is a known Al-Aqsa guy and it is Al-Aqsa attack, and it will  
24 help the jury understand the connection between Al-Aqsa and  
25 financing of terror and this case.

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1 THE COURT: How are they going to understand that if  
2 they have no idea why he is being accused?

3 MR. YALOWITZ: Because our expert will explain what  
4 the operation was, what operations like this are, what the  
5 results were, the fact that he has an opportunity to come in  
6 and show up on appeal and say no, no, you've got the wrong  
7 guy --

8 THE COURT: But that doesn't tell me what he did and  
9 who says he did it.

10 MR. YALOWITZ: I can't dispute that, your Honor.

11 THE COURT: All right. And you say this and 9 --

12 MR. YALOWITZ: 954.

13 THE COURT: -- 954 go together?

14 MR. YALOWITZ: Correct.

15 THE COURT: Did you want to respond to that?

16 MS. FERGUSON: Your Honor, this is nothing like an  
17 OFAC document. It comes from the Israeli Ministry of Foreign  
18 Affairs, and it is just making an accusation. So going to Eric  
19 Holder's example, you wouldn't allow Eric Holder to announce in  
20 a press release about someone being arrested coming in for the  
21 truth of the matter that the person actually carried out the  
22 crime. And as Mr. Yalowitz noted, this is the very document  
23 that you considered in deciding that the plaintiffs had no  
24 admissible evidence that Naef Abu Sharkh was involved in the  
25 Mandelkorn bombing incident. It is just the Israeli Ministry

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1 of Foreign Affairs relaying information communicated by the  
2 government press office about some operation that they made an  
3 accusation about something. We don't know the basis. This  
4 isn't some official finding of some investigation.

5 And the related PowerPoint, I can't tell who it is  
6 from, and it has no attribution that it was prepared by any  
7 particular government official.

8 THE COURT: Does give any details of what this  
9 person's role was supposed to be?

10 MS. FERGUSON: It gives no detail about who  
11 prepared --

12 THE COURT: No. I mean, any detail about what  
13 Sharkh's role was in the bombing?

14 MS. FERGUSON: No. It just says that -- it calls him  
15 a senior fugitive of the Tanzim infrastructure in Nablus who  
16 was behind a large number of suicide bombings, and then it  
17 lists this one. But, again, there is no independent evidence  
18 Mr. Yalowitz has of involvement with Naef Abu Sharkh in the  
19 Mandelkorn incident. That is why the respondeat superior claim  
20 has been dismissed from the Mandelkorn case. So he is now  
21 trying to reargue that whole ruling.

22 THE COURT: Mr. Yalowitz, do you know what he is  
23 alleged to have done?

24 MR. YALOWITZ: I will say that I have custodial  
25 statements from co-conspirators saying I got money from Naef

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1 Abu Sharkh to perpetrate terror activities, to recruit  
2 terrorists. So we have a pretty good idea that he was a funder  
3 of terror. But, you know, you have to kind of put some pieces  
4 together. It is not -- I don't have a conviction. I don't  
5 have a -- I mean, he is not a recruiter. He doesn't film video  
6 wills of terrorists. He is a money guy. And they seized his  
7 bank accounts.

8 THE COURT: And he was supposed to have given money to  
9 a terrorist who admitted the Mandelkorn incident?

10 MR. YALOWITZ: That is a gap in my proof.

11 THE COURT: OK.

12 MS. FERGUSON: And the custodian statement  
13 Mr. Yalowitz is referring to would have to be redacted to  
14 remove Naef Abu Sharkh's name because it is only --

15 THE COURT: I understand.

16 MS. FERGUSON: There is no other evidence.

17 THE COURT: All right. I'm not convinced that this  
18 can go in for that purpose.

19 MR. YALOWITZ: All right. We will respect the Court's  
20 ruling on that and move on.

21 THE COURT: Is there anything you want to say more  
22 about -- because I have similar problems with these just  
23 releases from the office. You have the Prime Minister's office  
24 releasing statements about the PA.

25 MR. YALOWITZ: If I can just walk through a few with

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1 your Honor?

2 THE COURT: 353 is the next one I have. I had a  
3 problem with 353. As I said, I'll give you -- I'm sorry. Yes,  
4 I'll give you 354, but I have a problem with the two before  
5 that, 339 and 353, for those reasons.

6 MR. YALOWITZ: You've got to bear with me, your Honor,  
7 because I kind of put them out of order.

8 THE COURT: Basically, it's all of the other documents  
9 that give factual recitations that I don't know if there is any  
10 underlying proof of or whether or not there is any other  
11 independent proof of --

12 MR. YALOWITZ: OK. 353 I don't care about.

13 THE COURT: All right. Let's go past that.

14 MR. YALOWITZ: Yes.

15 THE COURT: Then I gave you 354.

16 MR. YALOWITZ: OK.

17 THE COURT: What about 365? I mean, I'm not quite  
18 sure --

19 MR. YALOWITZ: So 365 is a -- it's a recitation by the  
20 Israel Ministry of Foreign Affairs of what Israel did when it  
21 entered the City of Ramallah and what it seized, which was arms  
22 and weapons and individuals, including some of the  
23 individuals -- at least one of the individuals who perpetrated  
24 an attack in our case. So like --

25 THE COURT: Where is the fact that you want?

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1 MR. YALOWITZ: So the first fact that I want is  
2 starting on the morning of March 29, IDF Central Command forces  
3 entered the City of Ramallah, and then here's what they found.  
4 Large stores of weapons and arms were discovered during the  
5 sweep of the Mukataa compound and other locations in Ramallah  
6 as follows. And they list all these weapons.

7 THE COURT: OK. And who are you trying to tie these  
8 weapons to?

9 MR. YALOWITZ: To the PA.

10 THE COURT: OK. How do you tie it to anybody who  
11 committed any one of these --

12 MR. YALOWITZ: This goes to PA policy of having  
13 illegal weapons and then we tie that, for example, to the  
14 conviction of Fuad Shubaki, who was the senior PA finance --  
15 Arafat's senior finance associate who admitted and who was  
16 convicted of buying weapons for use in terror operations.

17 THE COURT: OK. So what terrorist attack are you  
18 tying this to?

19 MR. YALOWITZ: I don't have a particular attack that  
20 any of these weapons were used in because they were seized.

21 THE COURT: OK.

22 MR. YALOWITZ: This goes more to policy of what are  
23 they doing collecting all of these weapons.

24 THE COURT: Frankly, I don't think it is going to be a  
25 surprise to anybody on this jury that the PA accumulates

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1 weapons.

2 MR. YALOWITZ: Well, that's --

3 THE COURT: Or the PLO accumulates weapons.

4 MR. YALOWITZ: I think that's right but I've got to  
5 show them something.

6 THE COURT: No. You've got to show them a connection  
7 with the plaintiff's causation.

8 MR. YALOWITZ: This is for policy. This is not  
9 connected to any --

10 THE COURT: A policy of accumulating weapons?

11 MR. YALOWITZ: Correct. Accumulating weapons that are  
12 inconsistent with the -- the defendants' thesis is that they're  
13 trying to tamp down violence. OK? The IDF goes in and seizes  
14 a whole bunch of weapons that are used for violence against  
15 civilians. That's a tipoff that maybe they are not really  
16 trying to tamp down --

17 THE COURT: The only thing you just said that I don't  
18 see any proof of is that any of these weapons that were seized  
19 why used against civilians.

20 MR. YALOWITZ: I'm sorry, that they were used? No,  
21 they weren't. They were seized.

22 THE COURT: So they weren't used against civilians.

23 MR. YALOWITZ: I agree with that.

24 THE COURT: So there is not any evidence that -- it is  
25 just as consistent with the next time they decided that they

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1 are going to have a war, or as opposed to the next time that,  
2 you know, they are going to have a terrorist attack, I don't  
3 see it specifically advancing your argument that they were  
4 connected to these terrorist attacks, or that because they have  
5 weapons it makes it more likely than not that they were  
6 involved in either participating in these terrorist attacks or  
7 encouraging these particular terrorist attacks, or terrorist  
8 attacks at all.

9 MR. YALOWITZ: So I don't want to argue that. I don't  
10 want to debate that issue with you. I do think that having a  
11 bunch of weapons laying around in places they shouldn't be is  
12 inconsistent with the policy of discouraging violence. So, for  
13 example, we have --

14 THE COURT: There are a lot of people who would  
15 discourage violence but feel that they have a right to arm  
16 themselves and protect themselves if necessary.

17 MR. YALOWITZ: I think it definitely depends on the  
18 particularized facts and circumstances. And, your Honor, I  
19 don't want to fight all that hard on this document.

20 THE COURT: I just want to understand it. You know,  
21 again, I still -- you know, I have the same problems with just  
22 general releases about what the Ministry of Finance for Foreign  
23 Affairs wants to tell the rest of the world about what they did  
24 and why they did it in cryptic, unspecific language, and we are  
25 supposed to infer from that, you know, that this must mean



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1 that, you know, they are seizing weapons that were used in  
2 terrorist attacks or weapons that were used in these particular  
3 terrorist attacks, because that is not the reasonable  
4 inference. So I have a problem with that. I think I am going  
5 to stick with my ruling.

6 MR. YALOWITZ: I am fine with that. I just want to be  
7 very clear that this document is a very generalized document  
8 about weapons that actually weren't used in any terrorism.

9 THE COURT: I understand.

10 MR. YALOWITZ: So I have no problem with the Court's  
11 ruling based on that understanding.

12 THE COURT: As I say, if some of the other documents  
13 that you say were seized I find that they have relevance and  
14 they are admissible if you can establish, you know, as I say,  
15 where it came from, what it purports to be, and the jury can  
16 determine whether or not in fact this is a statement by the  
17 defendant.

18 MR. YALOWITZ: So the Court is sustaining the  
19 objection on 365?

20 THE COURT: Yes.

21 MR. YALOWITZ: OK.

22 THE COURT: I have also -- I mean, my position would  
23 be the same, unless you have a different argument to make, on  
24 539.

25 MR. YALOWITZ: So 539 is an important one. It

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1 actually does have seized documents that we rely on. And you  
2 can see them, your Honor. Like, if you go to, just to give you  
3 an example -- a lot of these -- like, if you go to page 5 --  
4 no, that is not a good example. But if you go to page 9,  
5 here's a good example. You can see that -- are you with me,  
6 your Honor?

7 THE COURT: Yes. Document number 2.

8 MR. YALOWITZ: Right. So document number 2 is a list  
9 of guys that we can show were engaged in terror and in which we  
10 can show that the defendants knew were engaged in terror.

11 THE COURT: Are these documents in the other document  
12 that you had translated and seized? You have a bunch of  
13 documents specifically you say which have you seized.

14 MR. YALOWITZ: This is one of seized documents.

15 THE COURT: Is it in one of the other exhibits?

16 MR. YALOWITZ: I don't think so, your Honor. I think  
17 this is my source for document number 2.

18 THE COURT: And what do you say that it purports to  
19 say?

20 MR. YALOWITZ: It shows -- it is a request from Marwan  
21 Barghouti to Yasser Arafat asking that these individuals be  
22 paid.

23 THE COURT: OK.

24 MR. YALOWITZ: And then our expert will confirm that  
25 this sort of text that is kind of angled off to the side in the

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1 Arabic, that's Yasser Arafat's approval and Yasser Arafat's  
2 signature.

3 THE COURT: Do you claim that any of these individuals  
4 were related to any of these, or you just in general want to  
5 show their support of terrorism?

6 MR. YALOWITZ: Pattern of paying Al-Aqsa Martyrs  
7 Brigades members before they were designated to show that it  
8 continued after the designation.

9 THE COURT: OK. I mean, in the abstract, I thought --  
10 the evidence itself I don't have a big problem with because I  
11 thought that there was going to be other evidence, if not  
12 plenty of evidence, that you intend to offer that financial  
13 support was given to the --

14 MR. YALOWITZ: This is a really impactful example and  
15 there is other evidence, but, you know, we don't have, like,  
16 wire transfer instructions or checks saying pay to the order of  
17 the Al-Aqsa Martyrs Brigades. You have to piece it together.

18 THE COURT: Where do you say this document comes from?

19 MR. YALOWITZ: This document was seized by the  
20 government of Israel in that operation Defensive Shield.

21 THE COURT: Where do you say this exhibit comes from?

22 MR. YALOWITZ: This exhibit is from the Ministry of  
23 Foreign Affairs.

24 THE COURT: Well, I mean, how do you -- and how did  
25 you retrieve it?

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1 MR. YALOWITZ: The Israel Ministry --

2 THE COURT: No. How did you get it is what I want to  
3 ask you?

4 MR. YALOWITZ: We got it from the Israel Ministry of  
5 Foreign Affairs' website.

6 THE COURT: The website?

7 MR. YALOWITZ: Yes.

8 THE COURT: So this came off the Foreign Affairs'  
9 website. And is there anything else other than a general  
10 discussion of the PLO and Arafat being involved in terrorism,  
11 is there anything else specifically in this report that you say  
12 is relevant other than this one document that is referenced on  
13 page --

14 MR. YALOWITZ: That was an example. It is just an  
15 example I happened to flip through --

16 THE COURT: Do you have something else?

17 MR. YALOWITZ: No. For example, I will give you  
18 another example of a statement that I find very useful. Based  
19 on the granular analysis of these documents, they've reached  
20 some summary conclusions. For example, item number 2 on the  
21 very front page: "The closest aides to Arafat responsible for  
22 terrorist activity are Head of General Intelligence Tawfiz  
23 Tirawi and financier Fuad Shubaki." And Fuad Shubaki later was  
24 convicted of financing terror.

25 THE COURT: OK.

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1 MR. YALOWITZ: And Tawfiq Tirawi is implicated as  
2 having had a role in the Wafa Idris attack. He is the one that  
3 that letter is about. He is implicated as having had --

4 THE COURT: Which letter?

5 MR. YALOWITZ: The letter -- 233, the letter saying  
6 Tirawi knew about it --

7 THE COURT: Why do you need this report?

8 MR. YALOWITZ: I like having it in the English  
9 language so the jury can see that I'm not the only one saying  
10 it.

11 THE COURT: OK. And so you say this is what? What  
12 does this purport to be?

13 MR. YALOWITZ: It is a report describing the results  
14 of a legally authorized factual investigation conducted by the  
15 government of Israel.

16 THE COURT: OK.

17 MR. YALOWITZ: And it states facts found in those and  
18 conclusions drawn from those facts. You know, what some people  
19 call like meta facts or bigger facts.

20 MS. FERGUSON: Your Honor, if I can just address  
21 Mr. Yalowitz's contention?

22 THE COURT: Yes.

23 MS. FERGUSON: The report is a Ministry of Foreign  
24 Affairs' website relaying a report prepared by somebody named  
25 Danny Neva (phonetic), who is a minister of parliamentary

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1     affairs. I don't know what his expertise is, whether he was  
2     legally authorized to conduct an investigation, how he  
3     conducted his investigation, how he came to these conclusions,  
4     and yet Mr. Yalowitz wants to put before the jury Danny Neva's  
5     conclusions.

6             THE COURT: Well, I certainly read that these  
7     conclusions made the reference adopted.

8             MS. FERGUSON: Can I ask you to turn to page 2, where  
9     right before Danny Neva's name it says, "All allegations made  
10    in this report" -- and then it says "allegations" -- not  
11    binding, "all allegations" -- this is the full material right  
12    under paragraph 35. "All allegations" -- not binding -- "made  
13    in this report are true Israeli intelligence as a result of the  
14    Israel campaign to eradicate the sources of terror in the areas  
15    under the control of the Palestinian Authority."

16            So this is a political speech coming from the Ministry  
17    of Foreign Affairs, some report by somebody we have no idea  
18    what he basis it on, what his expertise was, and Mr. Yalowitz  
19    wants to offer it for these findings on the front page. This  
20    is patent hearsay. In addition, he wants to rely on this  
21    particular document -- in fact, I think he did pick the one  
22    that he thinks is his best one, and it doesn't say very much.  
23    It says at best that \$350 was given to some individuals who had  
24    no connection with this attack. That is his best document.  
25    This is Mr. Yalowitz's material support case. He doesn't have

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1 the documents. He has Danny Neva's photocopies and summaries.  
2 And he wants to have the PA found liable for terrorism based on  
3 this? This is his material support case he is looking at right  
4 here.

5 THE COURT: You know, Mr. Yalowitz, my position is  
6 this, that if you -- I have confidence with regard to the  
7 reliability and admissibility, at least for admissibility  
8 purposes, of these other documents that the Israeli government  
9 represented as being seized and they show the document and they  
10 translate the document. That gives me some degree of comfort  
11 about its trustworthiness and its reliability to overcome the  
12 objections that have been made by the defendant. But this is a  
13 different kind of a document. And my position would be,  
14 consistent with at least that theory -- and we can come back  
15 and revisit it -- consistent with that approach, I don't think  
16 that this document has a sufficient basis on which the  
17 conclusions are being drawn that will give either me or the  
18 jury reason to believe that somehow this is, you know, based on  
19 some direct evidence, as you've referenced in these others.

20 Is there some reason why you have these other  
21 documents and not this document?

22 MR. YALOWITZ: I'm sorry. I just didn't understand  
23 The court's question. I want to answer the Court's question.

24 THE COURT: Yes. I mean, for example, you give -- as  
25 an example, you say that the document that was seized has

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1 Arafat's signature on it approving payment to certain  
2 individuals. You have a lot of those documents, and you have a  
3 lot of translations of those documents at the end.

4 MR. YALOWITZ: Right.

5 THE COURT: Is there some reason why that document is  
6 not available to you?

7 MR. YALOWITZ: This is my source for that document.

8 THE COURT: Yes.

9 MR. YALOWITZ: So --

10 THE COURT: You have more direct sources for some of  
11 these other documents. You have given me the document and the  
12 English translation of the document.

13 MR. YALOWITZ: In some cases I have the document. In  
14 other cases I have a reproduction of a document in a government  
15 report. As long as I can use -- as I understand the Court's  
16 ruling, you don't want me to put in front of the jury the kind  
17 of ultimate analysis that the report is making, and I think I  
18 can -- I don't have a problem with that. If I can use the raw  
19 material that's embedded in the report, I think that's enough  
20 for me.

21 MS. FERGUSON: Your Honor, I don't know how this raw  
22 material got embedded in Danny Neva's, the Ministry of Finance,  
23 report. I think this is very different from something that  
24 more directly purports to reproduce the document.

25 MR. YALOWITZ: I have no problem, your Honor, giving



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1 adequate foundation for that and making the link. That is not  
2 going to be an issue. I just want to use the documents.

3 MS. FERGUSON: Mr. Yalowitz doesn't disclose a witness  
4 who will lay a foundation for these documents.

5 THE COURT: How do you intend to demonstrate that  
6 these documents were documents seized -- I don't know even  
7 where these documents were gotten from. Where do you contend  
8 these documents came from.

9 MR. YALOWITZ: They came from the Palestinian  
10 Authority. They are the Palestinian Authority's documents.

11 THE COURT: How do you contend that they came into the  
12 hands of the person who wrote this report.

13 MR. YALOWITZ: The IDF, the Israel Defense Forces,  
14 went into the PA headquarters in Oregon House (phonetic) and  
15 they went into the PA headquarters in the Mukataa, which is in  
16 Ramallah, and they seized the documents.

17 THE COURT: Is that when they seized all these other  
18 documents, at the same time?

19 MR. YALOWITZ: Correct. Correct.

20 THE COURT: All right.

21 MR. YALOWITZ: And they inventoried -- and I've got a  
22 witness who can explain. They inventoried them --

23 THE COURT: You don't have any better view of this  
24 document?

25 MR. YALOWITZ: I wish I did, your Honor, but, you

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1 know, this is what I've got. You know, the truth is, when we  
2 blow it up on the screen, the jury is going to be able to see  
3 it and an expert is going to be able to break it down for you.

4 THE COURT: Look, you might convince me to be able to  
5 utilize the documents that purport to be seized and purport to  
6 be, those portions -- well, the documents themselves and the  
7 translation of the documents if you say that that is relevant,  
8 if the foundation can be laid that they were seized at the same  
9 time that these other things were seized and that is what the  
10 documents say. The report itself I have a concern with. Even  
11 the example that you reference, this statement, as the report  
12 is written, says in a letter addressed to Fuad Shubaki and then  
13 it says, quote, Arafat's crony and confidante. That is not an  
14 objective, fair, you know, factual characterization of the  
15 relationship between the two. He is asking somebody who has a  
16 perspective. His perspective is irrelevant. OK?

17 MR. YALOWITZ: I get it. Your Honor, I think I get  
18 the Court's ruling on this, and I think we can work with that.  
19 That is not -- I don't need the commentary and analysis.

20 THE COURT: If you can lay a foundation that these  
21 documents are documents that were seized from PLO offices and  
22 that these documents are identified as documents belonging to  
23 the PLO and the PA and/or identify, you know, that this is  
24 Arafat's signature on this document, I don't have a real  
25 problem -- I don't have the same problem that I had with the

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1 rest of the report, the documents themselves. I don't know if  
2 you can sufficiently lay the foundation as to why you say it is  
3 what it purports to be. But if you can overcome that, as far  
4 as I am concerned, at that point it is simply a statement by a  
5 party opponent.

6 MR. YALOWITZ: Correct.

7 MS. FERGUSON: Your Honor --

8 MR. YALOWITZ: I think we will be fine with that.

9 MS. FERGUSON: I'm sorry. There is a relevance  
10 objection because these documents have nothing to do with the  
11 attacks at issue. These individuals have nothing to do with  
12 the attacks at issue. And even as to this document, one, that  
13 Mr. Yalowitz wants to show the jury, it has got a parenthetical  
14 note. The document number two, which Mr. Yalowitz highlighted,  
15 that lists individuals who allegedly received \$350, it says:  
16 "Note, these activists are known FATA operational activists in  
17 Kulkar (phonetic) who were involved in lethal attacks." Now,  
18 that is not something that was in the PA document, that was  
19 something that Mr. Neva has inserted. I have a problem with  
20 these documents going to a jury. They are irrelevant and it is  
21 part of a -- they are a politicized report that was prepared --

22 THE COURT: If you can lay a little foundation that  
23 these documents are documents that were seized and that they  
24 appear to be or in fact are documents in the possession or were  
25 created by the PLO, the PA, depending on how you can do that --

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1 with Arafat's signature, it probably is a little easier than  
2 somebody who is not known generally without it, but if you can  
3 lay that, I am going to allow you to offer the document -- the  
4 underlying document and its translation. That is it. Not any  
5 commentary by this person who wrote the report, not any  
6 assessment about whether or not he thinks these are Arafat's  
7 cronies, all of that.

8 MR. YALOWITZ: That is how I understood the Court's  
9 ruling. I am good with that.

10 THE COURT: You look at that. You put it in a form so  
11 that they can see it. You give it with however you want to  
12 attach the translation, and I think I would be willing to give  
13 you that but not the exhibit as you have it.

14 MR. YALOWITZ: Understood.

15 THE COURT: All right.

16 MR. YALOWITZ: All right.

17 THE COURT: Also, my position is that I think 547  
18 doesn't appear to be admissible for any purpose.

19 MR. YALOWITZ: The reason -- there is only one reason  
20 I care about 547, your Honor, which is I want the jury to know  
21 the total number of fatalities during the years 2000 to 2004 in  
22 the series of terror attacks and that is these two graphs.

23 MS. FERGUSON: Your Honor, that is just --

24 MR. YALOWITZ: May I?

25 THE COURT: Go ahead and finish.

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1 MR. YALOWITZ: I am perfectly happy to just put the  
2 graphs in front of the jury, but I think that there is nobody  
3 who understands better the number of terror fatalities and  
4 casualties than the Israeli Security Agency, which is the  
5 agency charged with preventing attacks. Every single one of  
6 these numbers is a failure by that agency to prevent terror.

7 THE COURT: Well, I can't accept that. I can't --  
8 one, I think that is more prejudicial than probative to simply  
9 try to say there is a high level of violence, let's make the PA  
10 personally responsible for each one, when that is not the case  
11 we're proving here, nor can that case be proven at all, that  
12 the PA or the PLO is legally responsible for every act of  
13 terrorism that you claim happened in Jerusalem over a ten-year  
14 period. So I think that that is not appropriate. I think  
15 that, no, the jury cannot come to the conclusion that simply  
16 because there are a lot of terrorist attacks, it makes it more  
17 likely that the PA was involved in the terrorist attacks here  
18 at issue. I can't accept that.

19 MR. YALOWITZ: I think it's useful -- look, I don't  
20 want to wallow on this. It's not a critical point for the  
21 case.

22 THE COURT: All right.

23 MR. YALOWITZ: I think it is useful background for the  
24 jury to understand because part of my burden is to show that  
25 these attacks were to coerce and intimidate the civilian

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1 population, and a sustained campaign of terror is an element of  
2 that --

3 THE COURT: Yeah, but we can't go into a side trial on  
4 every other act of terror to try to prove whether or not the PA  
5 should be responsible for that.

6 MR. YALOWITZ: All right. I understand your ruling.  
7 Let's go to the next one.

8 THE COURT: 554 -- so we can move on, 554, I don't see  
9 why this is in this.

10 MR. YALOWITZ: I am fine with 554 being out, your  
11 Honor.

12 THE COURT: Again, I have the same issues as we  
13 discussed with regard to 559.

14 MR. YALOWITZ: Look, your Honor, 559 and 1109 are very  
15 important documents for the Guetta case, and so I want your  
16 Honor to understand what they show. I think I gave your Honor  
17 the demonstrative we created from these reports --

18 THE COURT: OK.

19 MR. YALOWITZ: -- which show the sort of spread of  
20 attacks in and around the area of Ramallah during the first --

21 THE COURT: Yes, I did look at that.

22 MR. YALOWITZ: -- 18 months.

23 THE COURT: This is the MO that you say you want to  
24 rely upon now that you say you had withdrawn --

25 MR. YALOWITZ: That is exactly right.

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1 THE COURT: -- the testimony identifying certain  
2 individuals?

3 MR. YALOWITZ: Correct. So these are the kinds of  
4 reports that experts rely on to show a pattern. They are  
5 not -- none of the reports in this case are -- none of the  
6 attacks --

7 THE COURT: I don't understand. Tell me specifically,  
8 what is it in this report that would lead one to that  
9 conclusion?

10 MR. YALOWITZ: This is a report saying here is the  
11 location of attacks by this cell, and these are the individuals  
12 in the cell who we've now captured and so we have solved  
13 this --

14 THE COURT: Where does it say that in 559?

15 MR. YALOWITZ: "The Israel Security Agency and IDF  
16 forces arrested a number of terrorists who are suspected of  
17 perpetrating many shootings that have killed and wounded  
18 Israelis."

19 THE COURT: OK.

20 MR. YALOWITZ: Then they say -- bear with me. I am  
21 just having a little trouble reading my exhibit.

22 (Pause)

23 They say, "Six members of the terror cell are  
24 currently being interrogated. The cell belongs to 417."

25 THE COURT: OK.

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1 MR. YALOWITZ: "And its members are suspected of  
2 perpetrating shooting attacks in the Ramallah area and the  
3 Samaria area.

4 THE COURT: All right. And you say that is in  
5 conjunction with what exhibit?

6 MR. YALOWITZ: 1109.

7 THE COURT: And 1109 supposedly represents what?

8 MR. YALOWITZ: 1109 is another statement communicated  
9 by an IDF spokesman saying that the IDF targeted a 417  
10 terrorist and that that terrorist and one of his  
11 co-conspirators committed the following attacks.

12 THE COURT: Right.

13 MR. YALOWITZ: And so the question is whether it is  
14 reasonable for an intelligence analyst to rely on reports like  
15 this.

16 THE COURT: Well, that is not exactly -- the answer to  
17 that is yes, they can rely on that. But the biggest problem  
18 that I have with this and what you have left with the Guetta  
19 case is that they analyzed a bunch of terrorist attacks. The  
20 one that is conspicuously absent is this one. They never  
21 attributed this one or made any conclusion that this one had  
22 anything to do with, had any pattern that was consistent with,  
23 that they were suspected of -- because they did these others,  
24 they were suspected of doing this one. That is a conclusion  
25 you want them to draw from their documents that don't draw that



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1 conclusion.

2 MR. YALOWITZ: That sounds like if -- I hope  
3 Mr. Rochon was taking notes because that sounds like something  
4 that he ought to say to the jury in summation. The fact that  
5 they didn't --

6 THE COURT: You've got to convince me, in conjunction  
7 with that, that you have enough evidence that I shouldn't grant  
8 them summary judgment at this point in time because the main  
9 evidence that you were relying upon previously was an  
10 identification that they significantly and severely attacked a  
11 later identification by a witness who was going to tie a PLO  
12 associate or PA employee with this attack. You have withdrawn  
13 that evidence.

14 MR. YALOWITZ: I have.

15 THE COURT: So now you want to say that this attack is  
16 consistent with an MO that should lead the jury to conclude  
17 that the people who committed those other terrorist acts must  
18 have also committed this terrorist act. And you rely on an MO  
19 that, one, there is a shooting on a motorcycle, which,  
20 unfortunately -- I don't know if it was a motorcycle.

21 MR. YALOWITZ: Auto.

22 THE COURT: An auto shooting, which I don't want to be  
23 crass about it or insensitive about it, but it is not a  
24 particularly unusual set of circumstances in this area, and,  
25 two, that it covers an area of Jerusalem, in the environs of

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1 Jerusalem, which, again, is not particularly unique with regard  
2 to any of the terrorist attacks that you are pointing out here,  
3 you know, what else you refer to as something being unique  
4 about this. But, also, the problem is is that it would be one  
5 thing if we were sitting here saying that the Israeli  
6 government did a report and they went through it and they  
7 analyzed it and they put these five, six, seven, I forget what  
8 number of terrorist attacks, on this list and said that these  
9 people are suspected of those and they put this terrorist  
10 attack on that list, but this terrorist attack is not on that  
11 list. There is nothing that they said that would lead to the  
12 conclusion that you want the jury to lead to.

13 I mean, I would think that if anyone had an interest  
14 and would swap such evidence that this is related to other  
15 attacks and a pattern of other attacks, it is exactly what the  
16 Israeli government went through, and they excluded this one  
17 after this one had occurred. So I'm not sure what is the --  
18 other than you saying that this is a firing into cars, which,  
19 as you say, your chart before we talked about, I don't even  
20 know how many firings into cars there must be but I know there  
21 are numerous others. And because it happened in this area, I'm  
22 sure most of the attacks happened in this greater area. I'm  
23 not that sure --

24 MR. YALOWITZ: Actually, here's my issue. I mean,  
25 obviously, the question you raise is of great interest to me.

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1 Are there a lot of shooting attacks of this MO in this area  
2 during this period of time? That was an interesting question  
3 you made. And we went and looked and we didn't see any. Now,  
4 maybe the defendants have done a better job than me and they'll  
5 come and say, well, here was one, here was one, here was one.

6 THE COURT: Well, there are a lot of shootings. You  
7 are aware of a lot of shootings.

8 MR. YALOWITZ: Yes.

9 THE COURT: Committed by different individuals.

10 MR. YALOWITZ: Look, what I'm telling you --

11 THE COURT: Shooting is not the unique part of this  
12 that makes it an MO.

13 MR. YALOWITZ: Correct. Shooting car to car, into  
14 cars in this area in this timeframe --

15 THE COURT: Is there some evidence that this is the  
16 only group that shoots into cars?

17 MR. YALOWITZ: I'm saying that in evaluating this  
18 evidence, my expert looked at are there other attacks with this  
19 MO that are attributable to other groups. That's a relevant  
20 question.

21 THE COURT: Well, and the MO that he analyzed was an  
22 MO, it's got to be a shooting of a car in this area --

23 MR. YALOWITZ: During this timeframe.

24 THE COURT: -- during this -- what timeframe are you  
25 talking about?

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1 MR. YALOWITZ: The first, you know, September of 2000  
2 to spring of '02.

3 THE COURT: And he concluded that there are no others?

4 MR. YALOWITZ: He couldn't find any.

5 THE COURT: No other what?

6 MR. YALOWITZ: No other shooting attacks that have the  
7 MO that your Honor is describing.

8 THE COURT: No. There is no other MO. He had to say  
9 that there is no other shooting attack in this area. That is  
10 the only MO that you give me. Into cars. There are no other  
11 shooting attacks into cars in this area during this period of  
12 time, is that what he is going to say?

13 MR. YALOWITZ: Attributable to other groups.

14 THE COURT: What do you mean, "attributable to other  
15 groups?"

16 MR. YALOWITZ: That is the question I ask. So you are  
17 asking me a question that I don't know the answer to so I don't  
18 want to misrepresent.

19 THE COURT: No, I understand that.

20 MR. YALOWITZ: So I don't know the answer to that  
21 question.

22 THE COURT: All right.

23 MR. YALOWITZ: Was there ever a shooting? You know, I  
24 don't know.

25 THE COURT: So the proof on which you want to go to

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1 the jury and have the jury conclude that the PA was involved in  
2 this shooting, is that 417 --

3 MR. YALOWITZ: More likely than not --

4 THE COURT: -- had been accused of several other  
5 shootings by the Israeli government. A lot of those shootings  
6 you want to argue happened in a similar manner as this  
7 shooting. So, therefore, the jury should conclude that 417  
8 members were involved in this shooting and that the PA and the  
9 PLO had what to do with it?

10 MR. YALOWITZ: Well, that is a second question.

11 THE COURT: Right.

12 MR. YALOWITZ: The question on which we have lost a  
13 significant portion of our case is the one you just said. Is  
14 it more likely than not that this was a 417 shooting? When we  
15 get past that, I don't think I have a big problem convincing  
16 the jury that members of 417 who committed shooting attacks  
17 were acting within the scope of their employment, for all the  
18 reasons that we have -- their policies, the statements in the  
19 police magazines, the discipline of 417. I don't think that is  
20 a real concern. I'm candidly telling you that without these  
21 two exhibits, at least -- either the exhibits or allowing my  
22 expert to rely on the exhibits, I don't see that I have a case  
23 left for her.

24 THE COURT: And so you want these two exhibits to  
25 demonstrate what?

Flcdsok2

1 MR. YALOWITZ: To demonstrate the location, timing and  
2 modus operandi of the attacks attributed by my expert to 417.

3 THE COURT: What would you say -- I think I tried to  
4 figure it out. But what would you say is the general  
5 geographic area, the size of the geographic area that you are  
6 using here?

7 MR. YALOWITZ: I think that it's --

8 THE COURT: Several miles?

9 MR. YALOWITZ: Yeah. The distance from Ramallah to  
10 Jerusalem is seven miles. If you look at the spread on a map,  
11 most of these are within three to five miles of --

12 THE COURT: Would it be accurate to say that most of  
13 the terrorist attacks, or at least most of the terrorist  
14 attacks at issue here and probably most of the terrorist  
15 attacks took place in that geographical area?

16 MR. YALOWITZ: No. No. That is actually not  
17 accurate.

18 THE COURT: OK.

19 MR. YALOWITZ: The thousand people dead and the 5,000  
20 people wounded were from all over Israel and from all over the  
21 West Bank.

22 THE COURT: I know. But the ones that -- I mean, of  
23 the ones that happened in and around Jerusalem, I mean, there  
24 are a significant number that happened in and around Jerusalem.

25 MR. YALOWITZ: Yes, that's true.

Flcdsok2

1 THE COURT: There is nothing unique about that.

2 MR. YALOWITZ: Right.

3 THE COURT: Because they happened in or around  
4 Jerusalem doesn't distinguish it as someone's, you know, MO.

5 MR. YALOWITZ: Right.

6 THE COURT: That it happened in and around Jerusalem.  
7 So that is not particularly compelling.

8 And the fact that it is a shooting doesn't distinguish  
9 it from probably most of the terrorist attacks in and around  
10 Jerusalem because probably most of them were shootings, not  
11 bombings, right?

12 MR. YALOWITZ: I'm with you.

13 THE COURT: And the fact that there was a shooting in  
14 a car, towards a car, or towards people in a car, are you  
15 saying that that is somehow unique to 417?

16 MR. YALOWITZ: I believe that the MO of driving up to  
17 a car, cutting it off, and having four guys pop out with AK-47s  
18 and rake the car with bullets was the MO of 417.

19 THE COURT: OK. But it didn't -- nobody else does it  
20 that way?

21 MR. YALOWITZ: I think that if the defendants have  
22 evidence that other people do it that way, my expert is not  
23 going to be very persuasive. I couldn't find evidence like  
24 that.

25 MS. FERGUSON: Your Honor, if I could just address

Flcdsok2

1 this MO point?

2 THE COURT: Sure.

3 MS. FERGUSON: Mr. Yalowitz's own exhibit, which  
4 should not come in as a public records exception, belies the  
5 notion that there is some sort of 417 MO. If you look at 1109,  
6 which the Israeli Ministry of Foreign Affairs captions, "417  
7 terrorist, known as Said Naderia (phonetic)," it describes  
8 attacks that they accused him of. One is a shooting at the  
9 National Insurance Building, so not a car. Another was a  
10 shooting attack on a bus. If you move on, there is a reference  
11 to a roadside bomb. I mean, there is no distinctive MO for  
12 417, even according to the Israeli Ministry of Foreign Affairs.

13 And I would just emphasize again that there was no  
14 finding by the Israeli Ministry of Foreign Affairs that 417  
15 even did any of these shootings that are identified; it is just  
16 they suspected people of it. And a reasonable jury cannot find  
17 based on the fact that the Israeli Ministry of Foreign Affairs  
18 is reporting that some people were suspected of some shootings,  
19 so, therefore, a PA employee carried out an entirely different  
20 shooting. I mean, this is -- it is almost incomprehensible  
21 that we are even debating whether this gets to a jury.

22 (Continued on next page)

23  
24  
25



Flczsok3

Conference.

1 THE COURT: I'm not sure what you say the pattern is  
2 with regard to Karsh. I don't see such a pattern.

3 MR. YALOWITZ: I think that your Honor's right here,  
4 it's shootings.

5 THE COURT: So you have shootings in and around a  
6 several mile radius of Jerusalem.

7 MR. YALOWITZ: Several mile radius of the 417  
8 headquarters.

9 THE COURT: Well, several mile radius of Jerusalem  
10 too.

11 MR. YALOWITZ: Although it's the pattern is really  
12 more toward their headquarters, but.

13 THE COURT: Which is --

14 MR. YALOWITZ: They're so close that -- I mean we're  
15 debating semantics.

16 THE COURT: But I mean like they're in the north and  
17 all these happened in the north or something? I'm not sure  
18 what you're --

19 MR. YALOWITZ: This one in a series happened within a  
20 few miles, within 3 miles of the Mukataa.

21 THE COURT: Let me just look at, what we're going I'm  
22 trying to do is to go another 25 minutes unless --

23 MS. FERGUSON: Your Honor, Mr. Yalowitz's experts  
24 testified it was a 15-mile radius, so we should get our facts  
25 straight.

F1c2sok3

Conference.

1 THE COURT: I thought it was much.

2 MR. YALOWITZ: Yeah, I mean I'm looking at -- I'm  
3 looking at the map. It's not -- I mean, there are a couple of  
4 outliers, but if you look at the map they're very tightly  
5 clustered.

6 MS. FERGUSON: We don't have a scale for the map, I  
7 mean the map's just frankly a little silly.

8 MR. YALOWITZ: Your Honor --

9 THE COURT: Well, the --

10 MR. YALOWITZ: Ms. Ferguson I think knows that the  
11 Mukataa is 7 miles from Jerusalem. She's been there, I'm sure.

12 THE COURT: You know what, I have two real problems  
13 with this. One is that, as I say, the conclusion you want them  
14 to draw from the Israeli reports are not the conclusions their  
15 Israeli reports draw. And two, you know, most of these Israeli  
16 reports are -- they don't hesitate to, as they say, point the  
17 finger at the PA and the PLO when they say they have such  
18 evidence.

19 These reports don't do that. These reports don't even  
20 say that the PA or PLO had anything to do with these. So I  
21 mean -- which is, quite frankly, unusual rather than usual;  
22 that if they suspected the PA or PLO to be directly involved in  
23 that, I would have expected, given the nature of the reports  
24 that you produced, that it would have said that. It doesn't  
25 say that the PA or PLO had any involvement in this. It says

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Conference.

1 that they think 417 did, but it doesn't say that 417, having  
2 known that this, the attack in this case had already taken  
3 place when this final report was written. It doesn't say that  
4 oh, and by the way, let's add this other terrorist act and that  
5 is the same -- that we have a reason to believe is the same  
6 committed by the same individuals.

7 So they've not concluded in this report that this  
8 attack was committed by the same individuals, based on any  
9 evidence that they have, nor do they reach that conclusion  
10 based on the way you want the jury to reach that conclusion.  
11 They don't say -- and I, quite frankly, one would suspect that  
12 they would not be hesitant to say so, if there was a pattern  
13 that was clearly discernible that both a lay person and a  
14 professional would recognize. And you're not asking the  
15 professional to recognize this, to accept this. You're asking  
16 lay people to recognize this and accept this, when there is no  
17 conclusion whatsoever by this report that they have anything to  
18 do with any other attacks, other than the -- I mean, you have  
19 12 attacks. I mean, you have to admit that to say they have 12  
20 attacks that were committed by these, by 417 as of March 2002  
21 to have this attack not on that list is conspicuously absent.

22 MR. YALOWITZ: So let me just try to make four points  
23 with you, your Honor, and I know you're thinking hard about it.

24 THE COURT: I'm also thinking of it in the context of  
25 your summary judgment.

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Conference.

1 MR. YALOWITZ: I understand that.

2 THE COURT: This is critical.

3 MR. YALOWITZ: I understand that, that's -- and I mean  
4 in candor that's why, as soon as I understood what I was doing  
5 with that ID, I brought it to you, because I didn't want to --

6 THE COURT: Right.

7 MR. YALOWITZ: There was --

8 THE COURT: Because this was not the main evidence  
9 that overcame their motion.

10 MR. YALOWITZ: I agree with that.

11 THE COURT: For summary judgment.

12 MR. YALOWITZ: I agree with that.

13 THE COURT: Initially.

14 MR. YALOWITZ: That's why I brought it to your  
15 attention. I agree with that and that's why we're having this  
16 discussion, because I brought it to your attention.

17 THE COURT: Yes.

18 MR. YALOWITZ: Okay. Four items. Item number one,  
19 the link between 417 and PA. I'm being very candid, I'm not  
20 going to have a problem with that, okay.

21 THE COURT: Right. But I'll, for the purpose of this  
22 argument --

23 MR. YALOWITZ: Grant me that for the purpose of this  
24 argument, okay.

25 Item number two, the absence of this attack on that

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Conference.

1 list of 12. I think is a cross question, it's a jury question.  
2 If everything else about this list was great and it was the  
3 exact same MO of the exact same place, you know, I don't think  
4 we'd be having the conversation because this wasn't on the  
5 list. That's what people do with attribution. So I think  
6 that's a thing they can argue to the jury. I don't think it's  
7 a thing that says no reasonable juror could say that that  
8 because it's not on the list it can't be that it's part of the  
9 same group. Okay.

10 Number three is a professional, does a professional  
11 think that this is the same MO by the same group, and would a  
12 professional attribute it to this group. You know --

13 THE COURT: Not the professionals who wrote the  
14 report.

15 MR. YALOWITZ: Not those professionals. But my  
16 professional came from the same agency and who I said, look,  
17 you know, I need to -- I mean, I'm not going to -- he believes  
18 that, he believes, based on his professional experience, that  
19 this attack is attributable to 417 based on -- and he comes  
20 from that agency, so.

21 THE COURT: And we're talking about who, Levitt?

22 MR. YALOWITZ: Shrenzel.

23 THE COURT: Oh, Shrenzel.

24 MR. YALOWITZ: Shrenzel. So I mean, I'm representing  
25 to you that he will say, without the ID, it is my professional

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Conference.

1 opinion, based on this evidence, I'm telling you what the  
2 evidence is, that this was a 417 attack.

3 Now, that may not be an adequate -- ultimately, it's  
4 your conclusion and I understand that, but I want you to  
5 understand the facts that this is his professional judgment  
6 without the ID and -- I mean I have no doubt that that's going  
7 to be his testimony.

8 THE COURT: Well --

9 MR. YALOWITZ: And so --

10 THE COURT: Go ahead.

11 MR. YALOWITZ: So really the question for the Court  
12 is, given those three facts or given those three things, are  
13 you going to keep him out, because his opinion is going to be,  
14 subject to questions and -- I mean, I understand the questions,  
15 I understand the weakness of this case without the ID. I  
16 really do. The question is is it for the -- could a reasonable  
17 jury conclude that it is more likely than not. It's not must  
18 have, it's not had, not beyond a reasonable doubt. Could a  
19 reasonable jury listen to this professional, evaluate his  
20 views, and conclude that it is more likely than not that this  
21 was a 417 attack. That's the question for the Court.

22 THE COURT: Well, the problem, part of the problem I  
23 have is that I'm not sure that's a professional opinion. I  
24 mean, all he's saying to us is what you said to us. I accept  
25 your word as strongly as I would his. You say because they're

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Conference.

1 all in the same area and were shootings, drive-by shootings as  
2 we call them, that's what we'll say because they were in the  
3 same general area of where 417 is and within miles of each  
4 other, and were driveby shootings, that it must mean that the  
5 reasonable conclusion is the 417 did this.

6 MR. YALOWITZ: And that we can't find others of a  
7 similar pattern. In other words, if there were five gangs  
8 operating in the area, I mean this is -- I think this is the  
9 basis for his views. If there are five gangs operating in a  
10 neighborhood in New York City, how do you know who did the  
11 crime? But if there's one gang and they control the turf and  
12 it's their turf and the crime fits their profile, that -- I  
13 mean those kinds of attribution experts testify all the time  
14 even in criminal cases.

15 THE COURT: But I don't assume that he's going to be  
16 able to say that there no driveby shootings other than these in  
17 this area.

18 MR. YALOWITZ: Well --

19 THE COURT: I mean, if you tell me that they're going  
20 to -- that he's going to say these are the only driveby  
21 shootings within this radius, that might be somewhat more  
22 compelling, but --

23 MR. YALOWITZ: Well, let me find out what he would say  
24 to that question, because I don't know the answer, your Honor,  
25 but I can find out and send the Court a letter this afternoon.

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Conference.

1 THE COURT: It's sort of like saying to me, well, over  
2 the last two years in downtown Manhattan there were 12  
3 robberies of banks, Chase banks in which the robbers used a gun  
4 and gave them a note saying put the money in the bag. We find  
5 that there is a robbery of the Capital One Bank downtown, so  
6 the reasonable conclusion is the person who robbed the Capital  
7 One bank with a gun handing them a note saying put the money in  
8 the bag, it's got to be the same person people who did the  
9 other 12 that are scattered around the area.

10 MR. YALOWITZ: Let me come -- I don't think it's the  
11 same. I think it's more like -- I mean, I think that it's --  
12 there is rivalries here between the PA and other groups like  
13 Hamas. I don't think you get four guys popping out of the  
14 window shooting people with machine guns every, you know,  
15 just -- it's not street crime.

16 THE COURT: See I don't think there is much detail in  
17 his report about that. I have to go look at his report. But I  
18 don't think his report really concentrates on that because that  
19 really wasn't the crux of your case, before --

20 MR. YALOWITZ: It does. His report does go through  
21 this issue. He relies on these exhibits.

22 MS. FERGUSON: Exactly. He relies on these exhibits.

23 MR. YALOWITZ: He does rely.

24 MS. FERGUSON: And the identification.

25 MR. YALOWITZ: If I may be heard, your Honor?



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Conference.

1 THE COURT: Let him finish, then I'll hear from you.  
2 Go ahead.

3 MR. YALOWITZ: Thank you. Look, I will ask my expert  
4 any question that the Court would like me to. It is not in my  
5 interest to promise something --

6 THE COURT: All right.

7 MR. YALOWITZ: -- and then not deliver it tomorrow.

8 On the other hand, I do think that -- I do think that  
9 it is for the jury to decide how reliable his conclusion is  
10 based on the facts and circumstances which are I think  
11 different from bank robberies in Manhattan.

12 THE COURT: I'm just not sure what it is in his  
13 expertise he knows that we don't know, and why it makes it an  
14 expert be able to say, oh, sounds the same to me as opposed to  
15 anybody else.

16 MR. YALOWITZ: It's I know the territory, I know the  
17 groups that operate in the territory, and I'm telling you this  
18 was the group that operated in the territory, not them. You  
19 know, the bloods didn't go up to that area at that time. It's  
20 that kind.

21 THE COURT: Did you want to add something? Because I  
22 want to speed this up?

23 MS. FERGUSON: Well, your Honor, I just want to  
24 emphasize that the core documents that Mr. Yalowitz wants to  
25 put in front of the jury are documents that come under the

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Conference.

1 public records exception.

2 THE COURT: Which documents? These two documents.

3 MR. HILL: The Ministry of Foreign Affairs Press  
4 Releases about accusations that the IDF has made that they've  
5 heard about them from an IDF spokesperson. That's not a public  
6 record. So the only thing Mr. Yalowitz has is Shrenzel who is  
7 relying on these very documents and Ms. Guetta's identification  
8 to say now we've drawn. That other stuff was not disclosed to  
9 us in his expert report, and there simply isn't enough that a  
10 reasonable jury could find, based on these, evidence that  
11 shouldn't even get to them, these Ministry of Foreign Affairs  
12 website materials that a PA employee carried out this attack.  
13 I mean, if this makes it to a jury, I mean then anything can.  
14 There's nothing here.

15 THE COURT: Well, is there a particular person that  
16 you say that there's evidence of that participated, who was  
17 associated with 417 that participated in this attack?

18 MR. YALOWITZ: I don't have an ID. So I know who the  
19 terror cell members were, but I can't link any of them. I  
20 can't -- you know, I'm not going to present evidence to this  
21 Court and this jury that this guy was one of the four shooters.

22 THE COURT: But is it your position --

23 MR. YALOWITZ: I couldn't do that.

24 THE COURT: I couldn't understand whether it was your  
25 position that every single person in 417 is a terrorist who

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Conference.

1 committed terrorist acts.

2 MR. YALOWITZ: No. That is not my position.

3 THE COURT: Okay. So how do -- so that's even more  
4 difficult. How do I pick which ones are you saying are  
5 supposed to be the ones that are responsible that are supposed  
6 to be connected to the PLO?

7 MR. YALOWITZ: There was a pretty well defined group  
8 who were. They were well known within the intelligence  
9 community. It was understood who they were, and in fact the  
10 head of 417 actually went to jail for being involved in  
11 terrorist activity, so.

12 THE COURT: Okay. Finally, let me just ask, then  
13 we'll move on and then come back to you.

14 MR. YALOWITZ: Okay.

15 THE COURT: What is your reasonable or your expert's  
16 reasonable explanation for why no one associated, no one in  
17 Israeli government associated any of 417 to this attack?

18 MR. YALOWITZ: I don't know the answer to that  
19 question, your Honor. If I knew it, I would tell it to you.

20 THE COURT: Okay. No, that's candid.

21 I want to address -- I may have to address it in the  
22 context of the objection.

23 MR. YALOWITZ: All right.

24 THE COURT: So I don't see this summary of four years  
25 of conflict, I don't see that to be admissible for the time

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Conference.

1 being.

2 MR. YALOWITZ: Summary, I'm sorry, this is six?

3 THE COURT: No 554.

4 MR. YALOWITZ: 554. We're fine not using 554, your  
5 Honor.

6 THE COURT: Okay. So let me get to some things that I  
7 do find admissible. 559 is the same. That's what we just --

8 MR. YALOWITZ: We just spent quite a bit of time on  
9 559.

10 THE COURT: 626.

11 MR. ROCHON: Judge, is 559 in or out?

12 THE COURT: 559 is -- I hadn't made up my mind yet  
13 because I want to figure out whether the case is still around  
14 whether it's in or out, so I'm going -- I want to just address  
15 that in the same context we'll come back to that.

16 626 I'm prepared to give that if you could demonstrate  
17 that, you know, it was retrieved from a certain location, or I  
18 don't know where you got that this from.

19 MR. YALOWITZ: We can authenticate it.

20 THE COURT: Right. You can show where it came from,  
21 and what it purports to be. It is represented to be documents  
22 which the jury could look at to determine whether or not it  
23 appears to be documents that of the PA or PLO.

24 MS. FERGUSON: Your Honor, if I could just be heard on  
25 626? It's mostly not reproducing documents captured. It's

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Conference.

1 called Arafat and PA's involvement in terrorism according to  
2 captured documents, and then it contains, you know, just a lot  
3 of discussion and summary and characterization. So I just want  
4 to be clear the document in its current form would not be  
5 admissible.

6 THE COURT: No, I disagree with that. Since it's only  
7 analyzing the documents themselves, and it's not making an  
8 independent analysis beyond the documents, I think it's an  
9 appropriate report and analysis and report. We know exactly  
10 what they're relying upon. If any of their conclusions are not  
11 consistent with these documents, I'm sure that you can point  
12 them out. So I don't see there's anything that I saw in the  
13 recitation and their evaluation of the document that would be  
14 an unfair characterization of what the documents are. And what  
15 conclusions might be drawn from it, you can argue that those  
16 conclusion should be drawn.

17 MS. FERGUSON: Your Honor, if I could just draw your  
18 attention to page seven.

19 THE COURT: Yes.

20 MS. FERGUSON: So it says on the top that several  
21 expressions of the direct support of terrorism provided by the  
22 GIA and other PA intelligent listed below as reflected in the  
23 document. Participation in terrorist attacks. From several  
24 documents that could be learned that intelligence personnel  
25 were directly involved in planning, preparing and carrying out

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Conference.

1 terrorist attacks.

2 So I mean this is highly prejudicial and there's been  
3 no foundation laid for how this comes in under the public  
4 records exception.

5 THE COURT: The foundation is they're saying that this  
6 is this one reason --either one worn can or can't.

7 MS. FERGUSON: But who is saying --

8 THE COURT: It doesn't matter who is saying it. It's  
9 either a reasonable conclusion to draw from the documents or  
10 it's not a reasonable conclusion to draw from the documents.  
11 The jury's going to say --

12 MS. FERGUSON: But under the --

13 THE COURT: Not this person. I mean she -- obviously  
14 they jury's not going to be surprised that the Israeli  
15 government believes this is evidence of support of terrorism.  
16 The fact is whether the documents do in fact support that  
17 position, that's not a fact. It's an analysis, an analysis in  
18 an official report.

19 MS. FERGUSON: But we don't know who prepared the  
20 report, how --

21 THE COURT: Doesn't matter who prepared it.

22 MS. FERGUSON: It doesn't manner the public records  
23 exception who prepared --

24 THE COURT: No, because they're analyzing the  
25 documents. They're not making reference to things that are not

F1c3sok3

Conference.

1 in --

2 MR. HILL: But you're going to allow Mr. Yalowitz  
3 to --

4 THE COURT: I mean if --

5 MS. FERGUSON: -- present it to the jury as fact, the  
6 conclusion?

7 THE COURT: That's not a fact, no. It's not a fact.  
8 That's their evaluation based on the document. That's a  
9 conclusion. You can say that that conclusion is not consistent  
10 with these documents so it should be rejected. They could say  
11 that the conclusion is supported by the documents, it shouldn't  
12 be rejected.

13 MS. FERGUSON: The other problem is that only a very  
14 small percentage of the supposedly captured documents are  
15 summarized here, so there could have been any number of other  
16 documents that were, you know, exculpatory that were not  
17 discussed, so it's a very selective misleading summary.

18 THE COURT: Well, that's quite a hypothetical, but  
19 there is no evidence that there's some exculpatory documents  
20 that weren't considered. I can't assume that that's the case.  
21 You may want that to be the case, but there is no evidence that  
22 they say they seized these documents. If the documents say I'm  
23 involved in terrorism, you know you can't argue that they  
24 didn't put in the documents that say I'm not involved in  
25 terrorism.

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Conference.

1 MS. FERGUSON: Just, there's a problem not, without  
2 knowing the process by which these few documents were picked  
3 and who prepared the analysis and --

4 THE COURT: It doesn't matter because there is -- it's  
5 not analyzing these documents with some other evidence. It's  
6 analyzing these documents and they're saying that's what those  
7 documents represent, and either these documents do support  
8 those conclusions or they don't support those conclusions. It  
9 doesn't say along with something else it supports these  
10 conclusions. So I can't accept those arguments. I think that  
11 they lay the proper foundation, indicate that these documents  
12 were whatever they're taken from, were represented to be  
13 documents that were seized from the PA, or the PLO, the jury  
14 could look at the documents make their own assessment whether  
15 or not it's reasonable to conclude these are PA documents or  
16 not PA documents, and whether or not what's in the documents  
17 either is consistent with, inconsistent with or supports the  
18 plaintiff's theory that these support their position that they  
19 were involved in terrorist acts.

20 MS. FERGUSON: But, your Honor, I mean findings and  
21 conclusions are being offered by an out-of-court declarant and  
22 we have no opportunity to cross-examine them who --

23 THE COURT: Yeah, because they're totally irrelevant  
24 to the jury's determination. They may agree with those  
25 conclusions.



F1c2sok3

Conference.

1 MS. FERGUSON: Then they should be redacted, right?

2 THE COURT: No, no. I, as I say, I think this is an  
3 official report. You don't redact conclusions in an official  
4 report if it qualifies as a official report simply because you  
5 disagree with the conclusion.

6 MS. FERGUSON: I guess I'm questioning whether it  
7 qualifies as a official report. I think the foundation's been  
8 laid to that, for that.

9 THE COURT: And I think if they tell us where the  
10 document came from, and the documents entitled Arafat's and  
11 PLA's involvement in terrorism according to captured documents  
12 they purport that's what it is, and the jury can decide what  
13 weight they want to give it. So I'm going to allow them to put  
14 that in. And consistent with that I am also going to allow  
15 them to put in 631, same thing.

16 MR. ROCHON: Could we have a proffer of which Israeli  
17 governmental entity or maybe it wasn't an Israeli Governmental  
18 entity, who prepared this document?

19 THE COURT: Where you going to say this document came  
20 from?

21 MR. YALOWITZ: It says right on the cover, IDF. That  
22 stands for Israel Defense Forces.

23 THE COURT: Okay.

24 MR. ROCHON: So, yeah. Upper right hand states IDF,  
25 so some IDF person prepared the document. But --

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Conference.

1 THE COURT: Okay.

2 MR. ROCHON: -- we don't know who, of course, and we  
3 don't know under what auspices.

4 THE COURT: They didn't prepare the document that some  
5 PLO person prepared the document.

6 MR. ROCHON: I wish.

7 THE COURT: Prepared the underlying document.

8 MR. ROCHON: There is only a few underlying documents.  
9 The rest are all these conclusions. You read this report,  
10 there is all sorts of stuff in here that has nothing to do with  
11 the documents, Judge. This is one you need to -- I know Mr.  
12 Yalowitz says this is a really important one when he thinks  
13 it's a really important one. This one, Judge, I honestly think  
14 is -- this is somebody in the IDF spinning their theory about  
15 the role of Arafat supposedly in terror, not based solely on  
16 documents, and for that to go to --

17 THE COURT: Well, I'm not sure what you're referring  
18 to.

19 MR. ROCHON: Well, if you look at the language, that's  
20 why it's so -- this requires I think some of the Court's time.  
21 So if you look, for instance, they talk about Arafat utilizes  
22 the civilian apparatus, his personal associate Fuad Shubaki and  
23 middle man and senior fatah activist in the west bank. It's on  
24 page five. There is no documents cited for that. There is  
25 places in here where they talk about --

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Conference.

1 THE COURT: I'm sorry, where are you on page five?

2 MR. ROCHON: On page five of the actual document in  
3 subsection b.

4 THE COURT: All right.

5 MR. ROCHON: Where it says at the end, to this end,  
6 Arafat utilizes the PA civilian apparatus --

7 THE COURT: I'm sorry, I'm looking at different page  
8 five.

9 MR. ROCHON: I'm sorry?

10 THE COURT: I'm looking --

11 MR. ROCHON: It's says.

12 THE COURT: Talking about 631 or about another  
13 document? You're not talking about 631, you're talking about  
14 because --

15 MR. ROCHON: 626 is what we've just been talking  
16 about.

17 THE COURT: Oh, because I went onto 631.

18 MR. ROCHON: Oh, I was trying to belabor a point.

19 MR. YALOWITZ: He was rearguing 626, your Honor.

20 THE COURT: Okay. On page five?

21 MR. ROCHON: We all do that.

22 THE COURT: What you did.

23 MR. ROCHON: Just as an example at the end of  
24 paragraph it says, to this end Arafat utilizes the PA civilian  
25 apparatuses, his personal associate Fuad Shubaki and, quote,

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Conference.

1 middle man, close quote, and senior fatah activist from the  
2 West Bank.

3 THE COURT: I know, but now I can't accept that.  
4 Because it says -- the sentence before that says, according to  
5 the captured documents, Arafat is involved personally and this  
6 is why the report draws this conclusion.

7 MR. ROCHON: So.

8 THE COURT: That's the legitimate thing that could be  
9 in any report.

10 MR. ROCHON: What they say is involved personally. If  
11 they go with the actual documents, your Honor.

12 THE COURT: No it says -- he personally, he signs  
13 allocation of both the small and large amounts to Fatah  
14 according to the documents. That's what they say, it's  
15 according to the captured document. They're referring to the  
16 analysis of the captured document. If this -- I understand  
17 your disagreement that this is an official report, but I do  
18 cannot accept your position that if it is an official report  
19 and is being admitted under that basis, that somehow this part  
20 of the official report is inadmissible. It's not.

21 MR. ROCHON: Your Honor, if the court pours through  
22 this thing you'll see this report consists of all sorts of --  
23 it's a mixture of the documents and what they have to say about  
24 them, and some spin by someone in the IDF written at a time of  
25 great hostility between the two.

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Conference.

1 THE COURT: I'm sure the jury can understand that if  
2 you want to explain that to them.

3 MR. ROCHON: Well, your Honor, but for it to come in  
4 it needs to meet standards for a public record and then all of  
5 the portions in it meet that be, and clearly --

6 THE COURT: Official records are not necessarily  
7 unbiased official records.

8 MR. ROCHON: Well but, they have to be of a  
9 constituted, a structure of an investigation.

10 THE COURT: Right, structure of an investigation of  
11 this report is an analysis of the captured documents. That's  
12 the --

13 MR. ROCHON: It has to have indicia of  
14 trustworthiness, Judge.

15 THE COURT: It has some indicia of trustworthiness  
16 because it has a bunch of documents that purport to look like  
17 PLO and PA documents and signatures that purport to look like  
18 signatures of PA and PLO officials.

19 MR. ROCHON: Even if you assume those documents are  
20 what they appear to be, despite the fact that we have just  
21 photo copies of this report, even if you assume that --

22 THE COURT: Unless you're denying it.

23 MR. ROCHON: What?

24 THE COURT: I'm assuming it for purposes of  
25 admissible, unless you're denying it.

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Conference.

1 MR. ROCHON: So you assume that for, if your Honor  
2 pleases of admissibility.

3 MS. FERGUSON: The conclusions in the report clearly  
4 go beyond those documents, they -- you look at the report and  
5 compare it to --

6 THE COURT: No, that's exactly the conclusion that the  
7 plaintiffs are going to ask the jury to draw. So it's up to  
8 the jury to determine the whether or not to draw those  
9 conclusions. I don't understand that.

10 MR. ROCHON: The reason the standard is so high for  
11 public records is because we don't get to cross examine the  
12 maker. So it has to have indicia of trustworthiness.  
13 Trustworthiness for the PA and the PLO to come to the United  
14 States, brought before a court, have people make claims against  
15 them for involvement in terror and to have the proof of that be  
16 some report from the IDF prepared at a time of great hostility  
17 with the client, but we don't even have the maker of the report  
18 available to cross-examine, is hearsay on top of hearsay.  
19 Eventually this trial becomes a trial of hearsay.

20 THE COURT: Well, the final word on this is the reason  
21 I draw the distinction because I drew the distinction where it  
22 is, they were relying on documents that were claimed to have  
23 been seized from the PLO and the PA that purport and on a lay  
24 person's review one could reasonably conclude are documents  
25 from PA files or documents, more likely documents created by

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1 the PA. That's what these documents are about. I drew the  
2 line at all these summary reports, and I accept your argument  
3 with regard to we have no basis to know what the reports are  
4 based on, what those summary conclusions are based on, what  
5 their factual allegations -- where the factual allegations are  
6 coming from.

7 That's not true with regard to the, what is purported  
8 to be PA documents seized from the PA and it's not -- I draw  
9 the line at PA documents that are claimed to be PA documents  
10 either seized from the PA or the PLO, or PA or PLO documents  
11 that were turned over by the PA and the PLO. I think that it  
12 has some indicia of reliability, unless you want to demonstrate  
13 to the jury that they should not accept it as what it purports  
14 to be because it is a forgery, it is not in fact what it  
15 purports to be, it was never taken from us, it was never  
16 produced by us, and that's not Arafat's handwriting. If you  
17 want to dispute all of that, that's fine. But in terms of my  
18 assessment of its reliability, without such evidence disputing  
19 those facts, it meets the minimum threshold of being admissible  
20 to put before the jury what is claimed to be PA documents  
21 either seized or obtained from the PA and PLO.

22 632 I think should be out because of the same  
23 consistent analysis. You know what, let me just run through it  
24 and you could --

25 MR. YALOWITZ: Bear with me, your Honor. I'm sorry,

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Conference.

622. Okay. I understand the Court's ruling.

THE COURT: Same analysis.

MR. YALOWITZ: I the Court's ruling.

THE COURT: 826 is in, based on the same analysis.  
829 is in based on the same analysis. 830 is in based on the  
same analysis.

MS. FERGUSON: Your Honor, can I just say something  
about 830? It doesn't purport to be a government document.

MR. YALOWITZ: I can establish that through testimony  
your Honor.

THE COURT: All right. Well, if they lay the proper  
foundation, my attitude will be that obviously the crux of this  
is that these are supposedly PA -- these are PA documents  
created or possessed by the PA or PLO. He still has the burden  
of laying, as I say, proper foundation, where did this come  
from, what is it, why should one consider reasonably that it is  
what it purports to be, all right. And I think, as I say, I'll  
skip 1109, come back.

My attitude is the same about 1118. It should be out,  
not in. 325, I believe 325 can be admitted if the proper  
foundation is laid for what it's supposed to be, where it came  
from. Same thing with 338. I looked at 338 photos. I don't  
see 338 photos to be a problem, so they can stay in.

The 473 the report. Seems to me if you can lay the  
proper foundation, that's admissible; basically crime scene



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1 report. 474 is out based on the same rulings I made with  
2 regard to photographs. 476 is out.

3 MR. ROCHON: Same with 475, your Honor?

4 THE COURT: I'm sorry, I skipped 475. Yes, 475 is  
5 out.

6 477. 477 can be admitted with -- let me just make  
7 sure -- yes, I didn't have a real problem with the photo. I  
8 think most of these photos are photos that were in the other  
9 document.

10 And then 1125. 1125 should be out and I don't think  
11 you need that. So then that should be that. All right?

12 MR. YALOWITZ: That's because of the photos.

13 THE COURT: Yeah.

14 MR. YALOWITZ: Yeah.

15 THE COURT: It's --

16 MR. YALOWITZ: I understand. Okay.

17 THE COURT: All right. So, and also, you know, some  
18 of this is cumulative too since you have --

19 MR. YALOWITZ: I'm sorry. I apologize, your Honor.  
20 May I have permission to consult for one second?

21 THE COURT: Yeah, sure. Then I think we might be able  
22 to wind up.

23 MR. YALOWITZ: Your Honor, what I'd like to do with  
24 1125 is, and we don't have to do this today, but I'd like to  
25 come back to the Court with a kind of a version of 1125 that

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1 doesn't have some of the photos that I think concern the Court,  
2 because there's some other useful information.

3 THE COURT: What is it that you want out of this we  
4 don't already have in this case?

5 MR. YALOWITZ: Some of the, what I do want --

6 THE COURT: You want the text or the photos?

7 MR. YALOWITZ: I want some of the other photos.

8 THE COURT: I think most of these photos I've already  
9 ruled on. Almost all, if not everyone of these photos was in  
10 the other binder of photos that we went through one by one. I  
11 think most of these photos already came in in that other  
12 binder.

13 MR. YALOWITZ: Let me go back.

14 THE COURT: The only I remember specifically that  
15 didn't come in was the first three pages.

16 MR. YALOWITZ: Right.

17 THE COURT: Pretty much the other photos --

18 MR. ROCHON: You went through them one at a time.

19 MR. YALOWITZ: Right. So 1125 comes in, but we  
20 just -- without those photos that the Court has excluded.

21 THE COURT: You said 1125 comes in.

22 MR. YALOWITZ: I'm asking.

23 THE COURT: 1125 is two things. It's a report and  
24 photographs. What are you asking for? I already gave you the  
25 photographs, so. And you didn't give it me to in this context.

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Conference.

1 There is something in this written report that you want?

2 MR. YALOWITZ: I don't think so. I think all I want  
3 is the photos.

4 THE COURT: All right.

5 MR. YALOWITZ: I got to look at the text.

6 THE COURT: Check the other photos I went through one  
7 by one, I told you which ones are in. I know that the first --  
8 I do have a recollection of the first three pages seeing those  
9 photos before in that binder and saying that those photos  
10 shouldn't come in.

11 MR. YALOWITZ: Yeah. No, no, your Honor, I don't mean  
12 to need the text. The text just foundationalizes the photos,  
13 so.

14 THE COURT: I understand.

15 MR. YALOWITZ: So the photos that the Court has said  
16 are in are in, the photos that the Court has said are out are  
17 out, and I don't need the document other than for admissible  
18 purpose.

19 THE COURT: So that's the way I think you should  
20 prepare for that.

21 MR. YALOWITZ: Great.

22 MR. ROCHON: Did your Honor rule on 631?

23 THE COURT: Which one is --

24 MR. ROCHON: You've similar sorts of rulings, but I  
25 don't know you if said the number. We objected on the same, it

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1 says --

2 THE COURT: Yeah, that's where I was, I was going to  
3 allow that, 631.

4 MR. ROCHON: Right.

5 THE COURT: Then I find it's pretty much an analysis  
6 of the, what they contain to be original documents that were  
7 seized from the --

8 MR. ROCHON: We won't repeat our arguments on that  
9 one, your Honor, but they would be similar to the previously  
10 made arguments on the similar types of reports.

11 THE COURT: Sure. I understand.

12 Then let me wind up.

13 Did you resolve the videos? I don't want no more  
14 information.

15 MR. ROCHON: On the videos there's one portion, it's  
16 videos of the two women and in general --

17 THE COURT: Have you resolved it is really all I want.

18 MR. ROCHON: We haven't resolved it. We might be able  
19 to.

20 THE COURT: Okay. Take your time.

21 MR. ROCHON: I'll tell them what my objection is at  
22 the break. Maybe who knows we might agree.

23 THE COURT: Okay. Have you come to some agreement  
24 about the demonstratives you want to use in opening? I should  
25 rule on that so you can prepare for that.

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1 MR. ROCHON: We don't seem to have come to an  
2 agreement because I've come to a disagreement.

3 THE COURT: All right. I have a list somewhere. All  
4 right. So you objected to -- you objected to using the GIS is  
5 materials about Ahmed Garghouthi? I'm not sure, I mean I think  
6 you acknowledged that. I already said that can come in.

7 MR. ROCHON: I know you ruled on authenticity and  
8 we're not objecting on the basis of authenticity or whether  
9 it's in fact the document that it purports to be. The  
10 objection that hadn't been at least dealt with was relevance as  
11 to this?

12 THE COURT: It seems to me Ahmed Barghouthi is a  
13 critical piece of that case, so I can't say that doesn't have  
14 relevance.

15 MR. ROCHON: I understand your ruling.

16 THE COURT: Okay. So they can use that if they want  
17 to, unless there is a real chance they're not going to be able  
18 to get that in evidence.

19 MR. ROCHON: 201.

20 THE COURT: 201, I'm not quite sure what your  
21 objection was.

22 MR. ROCHON: Well, this is among the documents that we  
23 have indicated we object to that are not our publication. And  
24 Mr. Yalowitz sent a letter saying, in essence, yes it is, and  
25 we should withdraw the remark. And Mr. Yalowitz attached to

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1 his letter something about this institute on whatever it's  
2 called National Political Moral Guidance, whatever it's called  
3 and --

4 THE COURT: You really need this in opening, Mr.  
5 Yalowitz, something we can --

6 MR. YALOWITZ: Do I really need it?

7 THE COURT: Yes?

8 THE COURT: Something we can resolve later?

9 MR. YALOWITZ: We can resolve it later.

10 THE COURT: Just hold back on it.

11 MR. YALOWITZ: Got it.

12 THE COURT: Assume you're -- look, to the extent that  
13 you can establish through expert testimony or otherwise that  
14 certain publications or publications generated, controlled or  
15 otherwise owned by the PA and the PLO, I'm going to allow those  
16 statements in those publications.

17 MR. ROCHON: But your Honor had said what kind of  
18 statements would come in. This is partly has to do with that  
19 rhetoric of incitement versus something related to a specific  
20 act, and so --

21 THE COURT: Well, I was more concerned -- look, there  
22 is some -- I got to give them, concede to them there is some  
23 relevance about heightened rhetoric that they claim that is by  
24 the PLO or the PA that they claim is urging people to commit  
25 violence. I got to concede there is some relevance to that.

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1 What we, the context in which we discussed it before was about  
2 statements by other people. I think, you know, there was a --  
3 I think it was even some little girl saying that you ought to  
4 kill all the people or something. I mean those kinds of  
5 statements. But, you know, I'm not -- look, the fact that  
6 they -- the fact that they want to argue there's certain  
7 statements or inciting others to violence, I can't say that  
8 they can't present some of that evidence.

9 MR. ROCHON: Right. And the rubber hits the road when  
10 we talk about which particular --

11 THE COURT: Right.

12 MR. ROCHON: -- ones.

13 THE COURT: Right.

14 MR. ROCHON: And the Court had indicated that hateful  
15 rhetoric was not going to come in; that it needed to be tied to  
16 encouragement of specific acts of violence. That was the  
17 standard last week when we're before you. And the plaintiffs  
18 offered in a separate letter what they thought met that  
19 standard. But for purposes of opening that Mr. Yalowitz isn't  
20 using 201, we don't need to address it.

21 THE COURT: All right, so we'll come back to all  
22 those. But as I say I'm going to give them some leeway, but  
23 it's got to be something that one logically would be able to  
24 conclude that it is in fact -- one, as I say, I don't know  
25 again, I don't know what you're going to -- your position is

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1 going to be about what the PA and the PA's position generally,  
2 you know, I don't know we're going to get into this debate of  
3 your saying, look, the PA and the PLO is seeking peace and is  
4 trying to --

5 MR. ROCHON: I'll tell you what I'm going to say. I'm  
6 going to say -- try this as a tort case, as whether or not  
7 there is evidence to tie to the specific incidents. I'm not  
8 going to try this as a second taffadal, the peace, lack of  
9 peace. I'm going to try a tort case. I'm not going to say my  
10 clients sought peace. I'm not going to be introducing specific  
11 denunciations even. And that's why I don't want them to inject  
12 that into this case. I'm trying to try a tort case.

13 THE COURT: Well, that's fine. And if that's the  
14 intent, your intent, then I'm going to give them less leeway in  
15 that regard.

16 But the original discussion we had was that there was  
17 a -- they would say, oh, they released people and you would  
18 say, no, they arrest people, you know. And they would say, no,  
19 they encourage violence and you would say, no, look they say  
20 don't do any violence. So if you guys are going to go back and  
21 forth with that, it's a moving target for me.

22 MR. ROCHON: I've been pretty clear I think. What I'm  
23 trying is the case is a respondeat superior for material  
24 support for the seven incidents, hopefully less than seven,  
25 when we're done down to it, that are going to be on trial.



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1 THE COURT: All right.

2 MR. ROCHON: And not --

3 THE COURT: We'll.

4 MR. ROCHON: And I won't be reserving opening so Mr.  
5 Yalowitz won't feel like he's sand bagged and he'll know after  
6 my opening where we are.

7 THE COURT: They'll have a better feel for both sides  
8 here, all right. So let's put that on the shelf and until  
9 not -- let's go beyond opening on that.

10 I'm not sure why you object to 512 being referenced in  
11 opening, used in opening if it's going to be admitted.

12 MR. ROCHON: Actually, your Honor, what I said was  
13 that the first part of 512 we recognize, we didn't object to  
14 about the 2004 law.

15 THE COURT: So.

16 MR. ROCHON: So the document itself includes  
17 subsequent laws as well, which is from 2006 and therefore is  
18 not proximate. Actually didn't object to the 2004. We  
19 previously noted our concerns about the -- you pretty much  
20 ruled that that's coming in. But the payment information  
21 that's relevant should be the one that was contemporaneous, the  
22 two.

23 THE COURT: I'm not sure what's the difference between  
24 2006 and 2004.

25 MR. YALOWITZ: Your Honor, I can't even tell what he's

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1 talking about. I'm flipping through the exhibit. Maybe he can  
2 clarify for the Court and for me.

3 MR. ROCHON: Sure. The articles through 13 start the  
4 2004 law, and then the next one starts with article one, you'll  
5 see at the end they say proposed 2006 law. They don't even  
6 indicate whether --

7 THE COURT: What's the difference?

8 MR. ROCHON: More money.

9 THE COURT: And I'm sorry?

10 MR. ROCHON: I mean, boil it down there is more money  
11 paid according to the draft 2006 law than the 2004.

12 THE COURT: I see. So they accounted for inflation  
13 and now a larger sum of money.

14 MR. ROCHON: That's it. And the real measure of how  
15 much people got paid, of course we've provided in discovery the  
16 payment records that show how much. So I don't know that we  
17 need possibly not an act of law when the real thing is how much  
18 did you pay these guys.

19 THE COURT: Well, the real thing is not even how much.  
20 Couldn't care less how much. The question is was there payment,  
21 what was the reason for it. Whether they got paid \$100 or  
22 \$1,000 is not particular relevant to the jury's assessment,  
23 whether it was a legitimate payment or --

24 MR. ROCHON: So that's our position, it's simply that  
25 the second part.

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1 THE COURT: Are you going to reference any of the 2006  
2 stuff in your opening?

3 MR. YALOWITZ: No, your Honor.

4 THE COURT: All right. Are you going to show the jury  
5 any part of that 2006 photo?

6 MR. YALOWITZ: No, your Honor.

7 THE COURT: All right.

8 MR. ROCHON: Good.

9 THE COURT: We'll see.

10 MR. YALOWITZ: Okay.

11 THE COURT: Then we can see whether or not all of the  
12 documents are --

13 MR. YALOWITZ: We're just dealing with opening.

14 THE COURT: Whether legitimate basis for excluding  
15 that.

16 Okay, then we're dealing with 1060.

17 MR. ROCHON: We didn't object.

18 THE COURT: And then we're dealing with the  
19 photographs and other demonstrative. You said there was -- you  
20 want to show them a picture of a funeral in opening?

21 MR. YALOWITZ: I'll withdraw it, your Honor.

22 THE COURT: All right. And --

23 MR. ROCHON: The photographs of the victims, your  
24 Honor, I do want to correct one thing. I believe some of the  
25 photographs that we objected to were of people who actually

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1 were hurt in the incidents, but they're not plaintiffs. We'll  
2 withdraw that objection. I mean if they're actually hurt in  
3 the incident, it's --

4 THE COURT: Some of the --

5 MR. ROCHON: Some of the victims in this -- people  
6 were hurt in these incidents are not plaintiffs.

7 THE COURT: Right.

8 MR. ROCHON: And there are photographs in there.  
9 Initially we objected and frankly --

10 THE COURT: You're not talking about gory bloody  
11 photographs. You're just talking about identifying certain  
12 individuals who might be witnesses or --

13 MR. ROCHON: They're family photos and --

14 THE COURT: Okay.

15 MR. ROCHON: -- we don't object to those where the  
16 people -- I mean they were hurt in the incidents, I can see  
17 where counsel wanted to use them.

18 THE COURT: All right. And then there were photos of  
19 convicted perpetrators. Is there some reason why you objected  
20 to that?

21 MR. ROCHON: Well, you'd have to I think look at them,  
22 your Honor. So I think this begins -- the papers aren't  
23 numbered, but it starts on -- it would be page 26, but these  
24 are the so-called terror cell.

25 THE COURT: Well, you object to the photographs

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1 themselves or just -- I know you objected to them being  
2 referred to as terror cell. You object.

3 MR. ROCHON: We don't object to the photos. We do  
4 object to the fact that the plaintiffs have put some client  
5 insignia next to them, presumably thinking they're employees.  
6 One of them, as far as we know, wasn't even an employee, but  
7 still has one of those insignia.

8 But the core prejudice on this is the reference to  
9 terror cells. The reason being of course it's not just word  
10 terror, know we're in a terror trial, but the idea of a cell,  
11 that these were some kind of organized cells starts to assume  
12 facts that -- actually for some of these these are pretty  
13 loosely, plaintiffs don't proper --

14 THE COURT: Is there some proof in this case of terror  
15 cells or is that just your --

16 MR. YALOWITZ: I think that's just a fair -- I thought  
17 that was kind of a description of a bunch of people who ban  
18 together to commit terrorism. It's a cell. I mean, you know,  
19 unit sounds more organized to me, terror unit sounds like  
20 they're regimented.

21 THE COURT: Well, what are you trying to describe them  
22 as, what is the demonstrative?

23 MR. YALOWITZ: They're a group of --

24 THE COURT: You are going to put up a demonstrative  
25 and going to show what, it's going to say these guys --

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1 MR. YALOWITZ: Right. So the demonstrative is very  
2 helpful to the jury to put a face to the name, to organize the  
3 evidence and to think about, okay, what was -- what were the  
4 different roles of these people in the attack.

5 THE COURT: Can you tell them terrorist group?

6 MR. YALOWITZ: Sure.

7 THE COURT: Can we live with that? If that's what he  
8 says, the proof's going to show, they were grouped together?

9 MR. ROCHON: I would -- I actually would object. They  
10 weren't a group. Some of these people didn't even know each  
11 other.

12 THE COURT: Well, but that's a question whether  
13 they're going to meet their promise. They say that they're  
14 going to prove that they worked together as a group.

15 MR. YALOWITZ: But I don't want to be restricted, if  
16 I'm talking and I say, well, this cell.

17 THE COURT: Why do you call it a cell? There's no  
18 witness is going to call it a name cell.

19 MR. YALOWITZ: Okay, just because --

20 THE COURT: If you say that some expert is going to  
21 say they're, quote, cell, then you can do that.

22 MR. YALOWITZ: I think what's happening here is the  
23 defendants are trying to micro manage my opening.

24 THE COURT: Well, that's -- I assume this does not  
25 significantly restrict your opening.

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1 MR. YALOWITZ: There is nothing wrong --

2 THE COURT: Another word other than cell.

3 MR. YALOWITZ: All right, I'll do that.

4 THE COURT: My suggestion would be is pick a word  
5 that's consistent with what the witnesses are going to  
6 characterize it as, all right.

7 MR. YALOWITZ: That's for sure.

8 THE COURT: So then if your witnesses are going to  
9 say, you know, this terrorist group organization whatever they  
10 are going to call it, then that's what the evidence is going to  
11 be and you have a right to comment on that evidence.

12 MR. YALOWITZ: Right.

13 THE COURT: If that's what the evidence is going to  
14 be. But if you have nobody in this case who is going to call  
15 it a cell, then you're not a witness and you don't get to call  
16 it a cell.

17 MR. YALOWITZ: Okay. I'm good with that. I don't  
18 want them popping up saying, oh, I object to the word cell.  
19 I'm going to talk to my witnesses, if that's their view and I  
20 feel like that's the right word based on their views, I might  
21 use that word.

22 THE COURT: No, you're only going to use that word if  
23 an expert is going to come in and describe these as cells and  
24 say why in his expert opinion these constitute cells.

25 MR. YALOWITZ: I agree with --

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Conference.

1 THE COURT: I don't know what a cell is supposed to  
2 be. Do you?

3 MR. YALOWITZ: Yeah, I mean that's --

4 THE COURT: Do you have -- is there some legal  
5 definition of a cell?

6 MR. YALOWITZ: It was the natural common sense  
7 definition of a group of guys that get together, hatch a terror  
8 attack. But you know, I'm going to talk to my witnesses, and  
9 if it's something that's consistent with --

10 THE COURT: I think it's a loaded word. You have the  
11 word terrorist, you don't need the loaded word cell. It sounds  
12 like we're dealing with Al Qaeda and Osama Bin Laden. We're  
13 not. That's not what this case is about. So I understand  
14 their objection.

15 MR. YALOWITZ: I'm going to call it a terror attack,  
16 because that's what it was.

17 THE COURT: Okay.

18 MR. ROCHON: I have no problem with that.

19 MR. YALOWITZ: Terror attack.

20 THE COURT: I don't know why attack and cell -- I  
21 think you're talking about the group, but terror attack is  
22 fine.

23 MR. YALOWITZ: Right, okay.

24 MR. ROCHON: There is only two other things, your  
25 Honor. One is one of these is a photo, all of them are photos



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Conference.

1 of the convicted or the perpetrator, except for one, there is a  
2 photo, a guy named Tawfiq Tirawi who is neither.

3 THE COURT: So what is Tirawi's role, what are you  
4 going to say, why are you showing his photo, who is he?

5 MR. ROCHON: Tawfiq Tirawi was a senior PA official,  
6 your Honor, head of the intelligence service.

7 THE COURT: You're going to say he's the one that  
8 directed some of these attacks.

9 MR. YALOWITZ: Correct, provided materials --

10 THE COURT: Some reason why they cant' show his  
11 picture?

12 MR. ROCHON: He wasn't convicted of that.

13 THE COURT: Well, it doesn't matter. Is there some  
14 reason why they can't show his picture?

15 MR. ROCHON: The picture is not the problem. It's  
16 what they say about him.

17 THE COURT: What?

18 MR. ROCHON: They say provided weapons, freedom to  
19 operate. They characterize, you know, him.

20 THE COURT: That's either going to be a fair  
21 characterization or what the evidence is going to show or  
22 that's going to be a promise that he made that he couldn't  
23 keep.

24 MR. ROCHON: I understand your ruling. But the last,  
25 your Honor --

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Conference.

1 THE COURT: The eagle graphics, is there some reason  
2 why it's appropriate to put graphics on the pictures as if  
3 you've already established that they somehow officially are  
4 part of the --

5 MR. YALOWITZ: It's my promise, I will prove that all  
6 these people were employees. I'm promising to prof that.

7 THE COURT: But you make the pictures appear as if  
8 that's somehow an official picture of them being associated  
9 with the PA or PLO and that's not. You created that.

10 MR. YALOWITZ: Look, okay, that's -- I created it,  
11 that's true. I'll be very candid about that. I created. It's  
12 my demonstrative, it's my representation. But I want boards in  
13 here with these pictures so the jury can see them and  
14 understand who they are when all the witnesses are testifying.  
15 And one of the things I'm going to prove is that the guys with  
16 little eagle emblems were employees. So it's my demonstrative.  
17 I'm going to represent it's not an official picture. But to  
18 tell me I can't put a symbol on my demonstrative to help the  
19 jury remember which ones were employees, I mean I think they're  
20 really reaching there, your Honor.

21 THE COURT: Well, I don't know what the picture looks  
22 like with this demonstrate so I don't know what --

23 MR. YALOWITZ: May I hand, I could hand up an example  
24 if it would be helpful to the Court.

25 MR. ROCHON: I've got --

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Conference.

1 THE COURT: I don't have a strong feeling one way or  
2 the other. I understand their concern that I am --

3 MR. ROCHON: I have a colored one if that helps.

4 THE COURT: I think our jury's probably going to be a  
5 little more intelligent than have to be misled by this. Let me  
6 see. Are you going to explain to them what these symbols mean?

7 MR. YALOWITZ: Of course.

8 THE COURT: What does the first symbol mean?

9 MR. YALOWITZ: The little eagle?

10 THE COURT: No, the other one. There is another one  
11 on the, is that some kind of symbol?

12 MR. YALOWITZ: You know, you have again my only copy.

13 THE COURT: Oh.

14 MR. YALOWITZ: I'm sorry.

15 THE COURT: It has a different symbol other than the,  
16 what's in that picture.

17 MR. YALOWITZ: Oh, that's just part of the picture. I  
18 don't know that's not --

19 THE COURT: That's not a symbol of any kind?

20 MR. YALOWITZ: Right. That's just part of the  
21 picture.

22 THE COURT: All right, okay.

23 You know what, now I'm not going to restrict you, as  
24 long as you make clear that you put those to indicate to them  
25 which ones you contend are -- you're going to tie to the PLO.

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Conference.

1 MR. YALOWITZ: Okay. Thank you, your Honor.

2 MR. ROCHON: Then the last one, your Honor, if I could  
3 tender, this is the last one. In our view this is sort of  
4 the --

5 MR. YALOWITZ: Is that 201?

6 MR. ROCHON: It is 201.

7 MR. YALOWITZ: Yeah, I already told him I'm not going  
8 to use it.

9 MR. ROCHON: That takes care of that one.

10 THE COURT: Okay, good.

11 MR. ROCHON: I'm on a roll.

12 THE COURT: So that's opening.

13 Again, with regard to -- it's not likely I'm just  
14 going to allow you to put in newspaper articles.

15 MR. YALOWITZ: I understand that.

16 THE COURT: I think we went through that.

17 MR. YALOWITZ: I think I get it.

18 THE COURT: To the extent, as I say, you say that  
19 these are communications of the PA and PLO made by the PA and  
20 PLO, that's one thing. But in terms of New York Times and Time  
21 Magazine.

22 MR. YALOWITZ: Look, the only thing I'll tell you,  
23 your Honor, the only thing that's coming up, and I haven't  
24 decided for sure I'm going use it, but there is -- one of the  
25 perpetrators in our attacks whose name is Nasser Aweis, was

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Conference.

1 quoted in Reuters as saying he was proud that he was a member  
2 of Al Aqsa Martyrs Brigades and he was proud that the United  
3 States had designated Al Aqsa Martyrs Brigades as a terrorist  
4 organization. Reuters carried that story. He's a member, he's  
5 an employee of the intelligence service, and so I don't  
6 really --

7 THE COURT: Is he a member of that Al Aqsa Brigade?

8 MR. YALOWITZ: He is. There is independent evidence  
9 of that. There is independent evidence that he's a member of  
10 the intelligence service. I just think it's interesting that a  
11 guy gets quoted in the newspaper and the intelligence service  
12 which, you know, you think a normal intelligence service would  
13 know when their employees are getting quoted in the newspaper,  
14 doesn't fire him, doesn't say anything about it, doesn't  
15 discipline him, so.

16 THE COURT: May be interesting, but I'm not sure it  
17 advances your cause of action.

18 MR. YALOWITZ: Okay. Well, that's -- I mean I think  
19 it does. If you're going to keep it out as hearsay, that's  
20 useful information for me to know. I'm not offering it --

21 THE COURT: I'm more concerned about its relevance  
22 than it's hearsay. You want them to conclude from that that  
23 they must be approving of that statement because he's making  
24 that personal statement?

25 MR. YALOWITZ: No. They don't care; that the fact

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Conference.

1 that the guy goes in the press and admits he's a terrorist,  
2 doesn't bother him.

3 THE COURT: You know, I'm not going to do it on the  
4 basis -- and this is going to be my ruling as a general  
5 principle -- I'm not going to do it on the basis of just your  
6 saying this was out there, they probably knew about it so they  
7 didn't do anything about it. If you have some direct evidence  
8 that he made this statement, that they were aware of it, that  
9 somehow in the deposition you asked somebody, well, when you  
10 heard him make statement, what was your reaction, if you have  
11 some evidence of that, then fine I probably would let you do  
12 it. But just the fact that now it was in yesterday's Wall  
13 Street Journal -- well, I didn't read yesterday's Wall Street  
14 Journal so I don't know what was in yesterday's Wall Street  
15 Journal.

16 MR. YALOWITZ: Okay, fine. We can move on. That's  
17 your ruling. I'll move on.

18 THE COURT: All right.

19 MR. YALOWITZ: Not agreeing with it, but --

20 THE COURT: No.

21 MR. YALOWITZ: But I don't think it's, you know.

22 THE COURT: I just want you to understand my position.  
23 You don't have to agree with it.

24 MR. YALOWITZ: Right. I get it.

25 THE COURT: All right, so this is about as I can do.

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Conference.

1 I'm going to try to give you, before the end of the day, what I  
2 am working on as a rough draft of the jury instruction. Quite  
3 frankly, it's kind of early in a case that's ten weeks, you  
4 know, away from jury selection for me to have a final draft of  
5 the jury instruction. Quite frankly, I'm not even sure what  
6 this case is going to look like.

7 MR. YALOWITZ: Feels very early, your Honor. I  
8 mean --

9 THE COURT: I agree.

10 MR. YALOWITZ: I appreciate it, but --

11 THE COURT: What I've done is -- maybe I can give you  
12 my general instructions, which are taken mostly out of Sand, on  
13 you know, about credibility and those kind of things and burden  
14 of proof. Those are really important.

15 I fashioned some instructions with regard to the  
16 substantive claims, with regard to harboring, with regard to  
17 providing material support, with regard to respondeat superior.  
18 I have some standard instructions which shouldn't be a surprise  
19 to you. So I'll give that to you as quickly as I can. But  
20 just understand it's rough and it doesn't have any of your  
21 objections that you might have to the language, and we'll work  
22 on it over the weeks as we get closer, but at least you'll have  
23 an idea where I'm thinking at this point in terms of how I  
24 started to approach that.

25 Now with regard to -- I guess I need to deal with

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Conference.

1 summary judgment. You know, with regard to --

2 All right. I guess the four that are now at issue are  
3 Guetta, Hebrew University, Sokolow and Mandelkorn; are those  
4 the ones that they've renewed their objection?

5 MS. FERGUSON: Yes, your Honor.

6 MR. YALOWITZ: That is correct, your Honor.

7 MS. FERGUSON: And as to the PLO for all.

8 THE COURT: Yes.

9 MR. YALOWITZ: I mean, they didn't technically renew  
10 their objection to Guetta, but I came to you because of the  
11 change in --

12 THE COURT: They did in the subsequent letter.

13 MR. YALOWITZ: Anyway, but whatever it's. I  
14 understand it's an open issue.

15 THE COURT: Yeah, well --

16 MR. YALOWITZ: But I want credit for it.

17 THE COURT: You may not want -- as they way, you may  
18 not want credit for it, because that's the one that I think is  
19 just as much as I struggled with it to see that, you know,  
20 whether or not it's appropriate to at least let the jury first  
21 evaluate that before I make any determination, without the  
22 identification, and solely on the basis of what you want to  
23 describe as an MO, that nobody has described prior to your  
24 coming up with it, I just don't -- I just can't see that that's  
25 enough for a reasonable jury to conclude that the PLO is



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Conference.

1 involved in that. I mean, it was significantly determinative  
2 when I ruled that the identification could come in, because I  
3 said you have an identification and that person is a PA or PLO  
4 employee or associate, then that would be enough to withstand a  
5 summary judgment and go to the jury and let them make the  
6 determination of whether or not that's a reliable  
7 identification, and I did so over the defendant's objection.

8 That identification now being represented for whatever  
9 reason that it's not going to be evidence before this jury,  
10 there's really no evidence, there is clearly no direct evidence  
11 that would point to a 417, the PLO or the PA, and the  
12 circumstantial evidence is so weak that I could not sustain a  
13 verdict if the jury were to say that we're holding the PA or  
14 the PLO liable for this terrorist attack simply because there  
15 were a bunch of other terrorist attacks that were done that  
16 sounded a lot like this one. And so since the Israeli  
17 government thought, quite frankly without any proof that I know  
18 that's going to come before the jury, thought that they were  
19 involved in these other terrorist attacks, that that's enough  
20 for me to convince me that because it was a shooting in the  
21 general area close to each other, close to the headquarters,  
22 that they must have been involved in this one too. And as I  
23 indicated, you know the problems I have with it in terms of the  
24 what is really purported to be the pattern here. And the fact  
25 that there is not even an -- even more liberally allowing you

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Conference.

1 to rely on the Government's, Israeli Government's determination  
2 that they believed that they're involved in terrorist attack,  
3 the Israeli government made no determination that they thought  
4 this was one of the attacks they were involved in. And that  
5 also weighs heavily in my evaluation of this and whether it's  
6 reasonable for the jury to conclude this when there is  
7 absolutely no evidence that the Israeli government indicated  
8 that they had that would point to this attack or lead them to  
9 put this attack on the list of a dozen acts that they obviously  
10 analyzed and had an opportunity to analyze.

11 So I think that given the paucity of evidence with  
12 regard to that, the MO evidence is not sufficient for a  
13 reasonable jury. Accordingly --

14 (Continued on next page)

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1 MR. YALOWITZ: Your Honor, let me just say, I  
2 understand the Court's ruling. I suspect that it was not a  
3 happy moment to write that --

4 THE COURT: I understand.

5 MR. YALOWITZ: -- letter. I do want to find out the  
6 answers to some of the questions the Court asked me. I don't  
7 know that it would make a difference. I'm not saying it would  
8 or wouldn't. But I want to reflect on it. And if I think it  
9 does, I will come back to the Court and at least say what those  
10 answers are and say why I think it makes a difference.

11 THE COURT: Sure.

12 MR. YALOWITZ: I understand the Court's ruling. I'm  
13 not -- I just want to make sure that I have really an accurate  
14 record --

15 THE COURT: Sure.

16 MR. YALOWITZ: -- as best I can --

17 THE COURT: You can write me a letter later today or  
18 if you want to --

19 MR. YALOWITZ: It may not be today. It may be in the  
20 next day or two.

21 THE COURT: Yes.

22 MR. YALOWITZ: But it's -- you know, this is a family  
23 that I've lived with.

24 THE COURT: I understand.

25 MR. YALOWITZ: And that I care about, and I want to do

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1 everything I can to save their case. And I understand the  
2 Court's ruling. I just want to make sure that I have all the  
3 facts.

4 THE COURT: Yes.

5 MR. YALOWITZ: And if there is something I can bring  
6 to the Court, I know you will entertain it.

7 THE COURT: I'm sure that they must understand. You  
8 have explained to them that their case has gotten significantly  
9 weaker rather than stronger since the last time I had  
10 considered the summary judgment motion because we had a  
11 identification --

12 MR. YALOWITZ: Even a simple country lawyer like me  
13 understands that.

14 THE COURT: I just want to make sure they understand  
15 it.

16 Now, with regard to the other claim, you know, I think  
17 it is close. I think that I don't have necessarily confidence  
18 that the plaintiff will meet its burden with regard to those  
19 cases, but at this point I am not compelled to grant summary  
20 judgment as to any of those others. I think that there are  
21 certain facts and factors that we'll to weigh in depending on  
22 how the evidence comes in. I think that with regard to the --  
23 I will just give you some examples rather than try to go  
24 through them in detail.

25 I think with regard to the Hebrew University

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1 circumstance, I think the evidence with regard to Ahmed is  
2 critical to them being able to overcome the hurdles that are  
3 required in order to, as I say, connect the dots on this one.  
4 I weighed the fact and have gone back and forth with regard to  
5 the different -- if the plaintiff wants to argue MO, the  
6 different MOs with regard to the Hebrew University bombing and  
7 some of the other incidents. The fact that even the plaintiffs  
8 attribute that pretty much to Hamas rather than to the AMB. So  
9 it is a different set of facts.

10 But I think that I am not significantly persuaded  
11 about the material support, that it has to be further evaluated  
12 because pretty much -- there are two things that I give you my  
13 concerns, but, as I say, it depends on what Ahmed's evidence,  
14 how that comes out. But, obviously, one, you are relying  
15 heavily on the providing of weapons but not any weapons that  
16 were associated with the bombing. You say Ahmed gave him a gun  
17 and you claim that he committed a bombing. Well, there is a  
18 little disconnect there. You can't say that they are providing  
19 him with a gun unless something else is disclosed during this  
20 trial necessarily to follow that they are supporting a bombing.

21 You've indicated and you say there was some evidence,  
22 but it was only from him that I had excluded, indicating that  
23 he was -- that -- well, two things: One, that they left some  
24 bombing materials at his apartment.

25 MR. YALOWITZ: I didn't think you excluded that, your

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1 Honor.

2 THE COURT: Well, the reason I excluded it, because he  
3 was the only one that says so, and the reality is he was in  
4 jail. He has no way to know that. That is clearly hearsay.  
5 He doesn't know whether or not they found and deliberately  
6 threw out his bombing material. I don't know what that  
7 statement is based on. I am not sure that statement is  
8 admissible.

9 Now, if you can convince me that you can get that in,  
10 I may give that some weight. But at this point I am assuming  
11 that, wait a minute. No. The guy who is sitting in jail can't  
12 tell me what happened in his house when the search was done.

13 MR. YALOWITZ: All right. We will have to look at it  
14 during the trial. I understand that. I understand what your  
15 Honor is saying. We will have to look at it during the trial.  
16 I think he is a percipient witness, but I understand your  
17 summary judgment is based on you are assuming he is not.

18 THE COURT: Now, if you say that there is some other  
19 independent evidence or some evidence that would indicate there  
20 is such nonhearsay evidence, you also contend that -- I assume  
21 you contend that they didn't know, they didn't find any. You  
22 contend that they stopped bomb making materials and they didn't  
23 seize it. I assume they are going to want to dispute that. I  
24 don't know how they are going to dispute that and what  
25 evidence, if at all, that they are going to dispute that.

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1 MR. YALOWITZ: We'll see what the evidence brings on  
2 that. I think we are better on that than you might think.

3 THE COURT: That is the phrase. It is harder for me  
4 on summary judgment to say in my mind I know what this trial is  
5 going to look like eight weeks from now. OK?

6 MR. YALOWITZ: All right.

7 THE COURT: As I say, I think that, you know, it is a  
8 closer question and there is a possibility that, obviously, I  
9 am going to have to assess when you rest whether or not this  
10 case is going to the jury or when they rest whether or not that  
11 case is going to go to the jury.

12 MR. YALOWITZ: I understand that.

13 THE COURT: And even I have to assess, if there is a  
14 verdict in your favor, whether or not the evidence does support  
15 such a verdict. So I have plenty opportunity to do that. I  
16 have also made an assessment that I don't think presenting that  
17 evidence is so unduly prejudicial to the defendant that I  
18 should be more concerned about making sure the jury doesn't  
19 hear this.

20 The fact is that I have taken significant steps to  
21 minimize the prejudice with regard to the evidence in that  
22 case. I have excluded, you know, gory photographs, etc.,  
23 certain types of things that would take this -- you know, make  
24 this somehow significantly more prejudicial than the other  
25 six -- five or six terrorist attacks that the jury is going to

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1 consider.

2 So I believe, as I said, Ahmed's involvement and  
3 whether or not you can establish and what you establish Ahmed's  
4 involvement to be and the pivotal connection between -- he  
5 seems to be the bridge between the individuals who perpetrated  
6 terrorist attacks and your proof that the PA or the PLO was  
7 involved, and I have determined that you should have an  
8 opportunity to at least attempt to --

9 MR. YALOWITZ: One thing I think we should be thinking  
10 about as this evidence comes in and as your Honor thinks about  
11 the evidence, I know in the summary judgment motion your Honor  
12 expressed concern about supplying the personnel under the  
13 material support. And, remember, we are talking about 2339(b),  
14 which is -- Hamas is a designated organization. So my state of  
15 mind --

16 THE COURT: Right. But your issue is greater than  
17 that. Your issue is causation.

18 MR. YALOWITZ: Causation.

19 THE COURT: You are doing this in the context of these  
20 particular --

21 MR. YALOWITZ: Correct. Correct.

22 THE COURT: -- attacks. So you are going to have to  
23 show me the relationship between that. You can't -- everybody  
24 can't recover simply because you showed that they gave support  
25 to Hamas. They can only recover if they are in fact a victim



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1 of that support.

2 MR. YALOWITZ: You are right. If there is a  
3 specific -- if the material support was a substantial  
4 contributing factor, I agree with that.

5 But what I was going to say is in the context of the  
6 Al-Aqsa Martyrs Brigades, I think the Court was concerned about  
7 saying the fact that a guy is in the PA police force, PA is a  
8 member of the Al-Aqsa Martyr Brigades, I don't want to say that  
9 that person -- that that is providing personnel. I read that  
10 ruling and I understand it, and I think there are other reasons  
11 why personnel could be an issue.

12 THE COURT: You have to tell me what they did. It is  
13 not a membership. It is determinative of the activity.

14 MR. YALOWITZ: So as we think about the evidence with  
15 Abdullah Barghouti, I just want you to be cognizant of the  
16 special -- first of all, there is a special definition of  
17 personnel under 2339(b) which I think cured some of the  
18 problems that Judge Koeltl was concerned about with the  
19 definition of personnel under 2339(a). But, also, when we're  
20 talking about letting a bomb maker out of jail and giving him a  
21 safe house, that kind of sounds like supplying personnel in a  
22 way that's different from my employee went off and did a crime  
23 and I'm trying to link the employer to the crime. That is a  
24 more classical respondeat superior issue. So I'm not saying --  
25 I'm just saying this is an issue --

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1 THE COURT: I will give you an opportunity to attempt  
2 to make whatever appropriate argument you want to make in that  
3 regard. The fact is that, look, you cannot simply say that  
4 because they release somebody from jail a year and a half  
5 before the person committed a terrorist act, that somehow that  
6 there is some -- you don't even have temporal proximity when  
7 you do that. So you can't say, oh, everything that the  
8 person -- but for the person being released from jail, he would  
9 have never been out there to commit a terrorist act. That is  
10 not the way you can prove this case.

11 You have to demonstrate that in anticipation of him  
12 committing a future terrorist act, and may have to establish  
13 that anticipation of him committing this particular terrorist  
14 act, they let him go so he could in fact commit that act. You  
15 know, I can't -- you know, it is like saying, well, Judge, why  
16 did you release someone accused of a crime from jail on bail  
17 and that person went out, you know, six months later and they  
18 robbed a bank. So it is your fault that they robbed the bank.  
19 Wait a minute. That is not the way it works. That is not the  
20 cause of his committing the crime, because I released him, you  
21 know, on bail six months later, unless you could establish the  
22 reason I released him is so he could go out and rob the bank.

23 MR. YALOWITZ: I think we are good on that. I think  
24 it is a Thelma and Louise kind of story, you know. He starts  
25 and goes on a crime spree.

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1 OK. I think the jury is going to be able to get there

2 MS. FERGUSON: Your Honor, if I could just have a  
3 clarification on the Yeshiva University?

4 THE COURT: Go ahead.

5 MS. FERGUSON: With some of the incidents like the  
6 Mandelkorn, you distinguish between the respondeat superior  
7 theory and the material support. So with Hebrew --

8 THE COURT: I am not making a distinction at this  
9 point because I don't think it is necessary, I think, because  
10 the evidence is going to come in, and it is going to come in,  
11 you know, whether it is one theory or another. So I am not  
12 here to define the theory. I am here to say whether or not I  
13 am going to dismiss the claims, but I am not going to  
14 dismiss --

15 MS. FERGUSON: It is our contention that there is no  
16 evidence of any employee who was involved of Yeshiva  
17 University. Ahmed Barghouti was convicted of a number of  
18 things but not for any involvement in the Hebrew University  
19 bombing, and he is the only employee in the mix here. So there  
20 is no evidence of an employee's involvement in the bombing.  
21 They say they have evidence of an employee helping someone who  
22 was involved in the bombing later but not of any involvement in  
23 the bombing itself.

24 THE COURT: All right. Well, since I'm not dismissing  
25 any of the claims as they are alleged in the complaint, I don't

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1 think I have to reach that issue and I am not going to reach  
2 that issue. But you may be right that it may be very simple  
3 for me when the evidence is in or when the plaintiffs rest to  
4 go ahead and put one or both aside at that time. But quite  
5 frankly, even the complaint as written is not clearly  
6 distinguishable of those claims. So I am still in the process  
7 of evaluating how these individual claims can go to the jury  
8 and identifying which ones. And that is a process that I am  
9 still working on that you won't have yet, which is my process  
10 of thinking about the verdict form. So as soon as I get some  
11 handle on how I am going to pose these questions with regard to  
12 each one of the events and each one of the theories that apply  
13 to that, I will have a better feel hopefully within the next  
14 couple of days or weeks to address that.

15 With regard to Sokolow, I think that there it is a  
16 close one. What has tipped me in the direction of giving you  
17 an opportunity to present that case is the evidence --  
18 primarily the evidence that you want to offer that the GSS was  
19 aware of the female bomber before it was announced. I think  
20 you have to give that some weight in conjunction with the other  
21 circumstantial evidence that you want to offer. Whether or not  
22 that is going to come out in a form that is going to be  
23 sufficient to meet your burden or for a reasonable jury to  
24 conclude liability, it is impossible for me to say at this  
25 point. But I will let you rely on that and other evidence that

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1 you have argued that does seem to effectively maybe not -- one  
2 of the reasons why I didn't grant summary judgment.

3 Now, with regard to the Mandelkorn, I think that the  
4 significant issue still remains with regard to the funding of  
5 the AAMB. I think that -- I can imagine a scenario that you  
6 could present that might make a reasonable jury conclude that  
7 they were responsible for funding the AAMB who went on to  
8 committing that terrorist attack and providing financial  
9 assistance to them, and I do so given the nature of the  
10 documents that we have been talking about and some of the  
11 testimony. Again, whether or not it is going to come in in a  
12 way that is going to be sufficient for a reasonable jury to  
13 conclude any liability against the defendants I think remains  
14 to be seen. But with regard to those issues and those cases,  
15 that is going to be in my ruling with regard to the summary  
16 judgment, and the parties should be prepared to move forward on  
17 that basis with those cases and the relevant evidence with  
18 regard to those cases.

19 I think pretty much that's as much guidance as I can  
20 give you now. I don't know what else is still outstanding.

21 MS. FERGUSON: There is the question of the PLO. Your  
22 Honor already held that their respondeat superior claims  
23 against the PLO are dismissed if there is no evidence of any  
24 PLO involvement, and the plaintiffs have not identified any PLO  
25 material support for these particular attacks.

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1 THE COURT: I'm sorry.

2 MS. FERGUSON: The plaintiffs have not identified any  
3 admissible evidence of PLO support for these attacks.

4 THE COURT: Well, I think that you've routinely argued  
5 to me that I should make a distinction between the PA and the  
6 PLO, a distinction that may or may not be an appropriate  
7 distinction to draw. I am not in a position to make that  
8 distinction at this point because the plaintiffs contend that  
9 they are going to demonstrate that there is a direct link  
10 hand-in-hand with the activities and decision making of the PLO  
11 and the PA and that they are going to demonstrate the same  
12 people made the same decisions, and they are the same officials  
13 that consistently made those decisions on behalf of the PA, the  
14 PLO. Now, whether they are going to be able to establish that,  
15 I don't know, but I am not in a position now to say that the  
16 decision making and the activity that they may end up  
17 attributing to certain individuals, particularly Yasser Arafat  
18 and other individuals, that when Yasser Arafat signs off on  
19 something, that technically it is only a sign off for the PLO  
20 with regard to an issue that he signed off for the PA and PLO.  
21 I think it depends on the nature of the decision making process  
22 and it depends on the nature of whether or not there are others  
23 who are making individual decisions that could be independent  
24 or inconsistent with those decisions.

25 So at this point I am not in a position to make a

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1 factual determination with regard to distinguishing the  
2 decision making process, the activities, or the involvement of  
3 the PA, particularly direct involvement in PA and PLO. I think  
4 it is a factual determination to be addressed by the jury, and  
5 I think depending on whether or not they can establish a  
6 unitary decision making process and a unitary involvement in  
7 these alleged -- these terrorist attacks, I think that is an  
8 issue for the jury to evaluate and not a legal question that  
9 the Court can as a matter of law determine at this point

10 MS. FERGUSON: There is a legal standard as to whether  
11 one entity can be deemed an alter ego of another, and the  
12 plaintiff have not proffered facts so it doesn't share  
13 leadership at the Yasser Arafat level, which is insufficient  
14 for alter ego status.

15 THE COURT: I am not even addressing specifically the  
16 legal relationship of alter ego. And it is a factual  
17 determination with Yasser Arafat, or others, who make  
18 decisions, sign off on issues, provide funding, if they say  
19 they can establish that, whether it is a decision being made on  
20 behalf of the PA or it is a decision made on behalf of the PLO.

21 MS. FERGUSON: But there is no evidence of any Yasser  
22 Arafat sign-off related to any of these attacks at issue.

23 THE COURT: There is clearly at least evidence of  
24 Yasser Arafat's sign-off on some payment of monies to people  
25 that they contend are people or entities involved in the

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1 terrorist attacks. So there is -- you know, if they say that  
2 Yasser Arafat approved providing money to the AAMB for the AAMB  
3 to commit a terrorist act, there is a factual determination,  
4 not a legal one, whether or not he was doing that on behalf of  
5 the PA or he was doing that on behalf of the PLO if he serves  
6 as dual roles in both organizations. I don't know what the  
7 evidence is.

8 MS. FERGUSON: Even the plaintiffs acknowledge there  
9 is no evidence of PA or PLO payments to an organization called  
10 the Al-Aqsa Martyrs Brigade. The only thing they are relying  
11 on is -- the classic example is that letter we looked at  
12 earlier where \$350 to this group of people unrelated, and we  
13 have no evidence that it is for terrorism or that there is any  
14 effort to reward terrorism.

15 THE COURT: That is a different issue than the issue  
16 you are raising now. The issue you are raising now is that  
17 somehow I should make a legal determination that the PA and the  
18 PLO are different entities so that any activity that the PA was  
19 involved in the PLO can't be responsible for that, or any  
20 activity that the PLO is involved in the PA can't be  
21 responsible for that. I do not have a record to make that kind  
22 of a determination.

23 MS. FERGUSON: So the absence of evidence against the  
24 PLO, the PLO is going to file based on evidence against the PA?

25 THE COURT: Well, you know the answer to that is no.



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1 As I am saying, the answer to that is no.

2 MS. FERGUSON: I mean, the PA is an elected  
3 government. So the whole alter egoness doesn't apply. At one  
4 point Hamas was running the PA government and they are not even  
5 part of the PLO.

6 THE COURT: I'm not sure what -- I'm sorry, go ahead.

7 MS. FERGUSON: They definitely do not meet the alter  
8 ego test.

9 THE COURT: OK. So I am not sure what decision you  
10 are asking me for at this point.

11 MS. FERGUSON: But in the absence --

12 THE COURT: You want me to rule what?

13 MS. FERGUSON: I want you to dismiss the PLO because  
14 there is an absence of evidence as to the PLO, and the PLO  
15 should not be tried based on attributing PA evidence to it  
16 based on an alter ego theory.

17 THE COURT: But there is separate evidence that they  
18 say that they are going to rely upon that they say would  
19 independently make the PLO responsible on not only a respondeat  
20 superior theory but on the theory that they are PLO agents and  
21 individuals who were acting at the direction of the PLO to  
22 commit these terrorist acts. I mean, that doesn't get them out  
23 of the case. I mean, it may end up being that they can't  
24 attribute both theories to both sides, and clearly I have  
25 already indicated that they can't attribute both theories to

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1 both sides because the PLO was not the employer and the PA is  
2 the employer so that respondeat superior theory only applies to  
3 the PA.

4 But any evidence that they want to offer that the PLO  
5 was directly involved in, supportive, provided material  
6 support, harbored terrorists who committed these acts, or any  
7 of their agents that they say were involved in participating in  
8 the accomplishment of these acts is direct evidence against the  
9 PLO, and the PLO would have to -- the jury would have to assess  
10 whether that evidence is strong enough to make the PLO  
11 independently liable or not. And they still have the burden  
12 and they will have the burden of demonstrating the independent  
13 liability of the PA and the independent liability of the PLO.

14 Now, if they want to establish that with the same  
15 evidence, that is another question. But if they -- you know, I  
16 don't think that there is anything that I have ruled that is  
17 inconsistent with that. And I don't think that there is any  
18 basis for me to conclude that there isn't sufficient evidence  
19 that they intend to try to present to indicate that PLO  
20 employees and PLO officials, the jury has evidence to consider  
21 as to whether or not they were either directly involved in any  
22 of these terrorist acts or involved in the decision that  
23 supported these terrorist acts. All right?

24 Anything else that we need to address before we go and  
25 prepare for tomorrow?

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1 MR. YALOWITZ: I have two items, your Honor. I have  
2 three items. One of them we don't need to address right this  
3 minute, but it is an open issue that I just want to make sure  
4 we can get back from you. The defendants have offered two  
5 depositions for these late-substituted witnesses. We would  
6 like --

7 THE COURT: If you want to do the depositions and you  
8 have agreed to it, go ahead and do the depositions.

9 MR. YALOWITZ: And I would like one of al-Bakri also,  
10 who we talked about before. He was one of the claims that  
11 Abdullah Barghouti escaped. I would like to do him in New York  
12 so that we don't have to have somebody running out to Israel to  
13 take these depositions.

14 THE COURT: The two depositions that you agreed to,  
15 you can do the al-Bakri deposition. I am not going to do that  
16 deposition at the same time unless you want to agree to that.  
17 If you want to agree to that, I don't see it at this point.

18 MR. YALOWITZ: All right. Can we have the Court order  
19 them to be done in New York so we don't have to send somebody  
20 out --

21 THE COURT: Are these people coming here as witnesses?

22 MR. ROCHON: Exactly. They would have to be here as  
23 witnesses, yes, your Honor. I should tell you that we may come  
24 to a point in this trial where some of our people are denied  
25 visas and we are having problems with that and have to do some

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1 testimony by videotape from there. They have applied for visas  
2 but --

3 THE COURT: How do you want to do depositions of these  
4 two people? You agree to do the depositions?

5 MR. ROCHON: I agreed to do them.

6 THE COURT: How?

7 MR. ROCHON: I don't know when they are going to get  
8 here right now. You will have to give me time to figure out  
9 the travel plans, your Honor.

10 THE COURT: All right.

11 MR. ROCHON: I will obviously try to get them here a  
12 couple of days before they testify so he can do their  
13 depositions.

14 THE COURT: Let me see if I can solve your problem.

15 MR. YALOWITZ: Thank you.

16 THE COURT: You have two choices. You can get them  
17 here the week before they are going to testify, in that week,  
18 to do the deposition. So they should be here sometime before  
19 the Friday before the Saturday or Sunday. If they are going to  
20 do the deposition, do the deposition so they can have it, they  
21 can review it over the weekend, and they can further prepare  
22 for the witness the next day. If that is not possible, then  
23 you should both consider whether or not you are going to do --  
24 you can make arrangements for some kind of video deposition of  
25 these witnesses immediately -- immediately within the next two

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1 to three weeks so that they still have an opportunity to do  
2 that if they want to convince me, after they have done that,  
3 that somehow that is inadequate and I can hear that.

4 But it seems to me that you either should give them a  
5 very early video deposition within the first two or three weeks  
6 of this trial or give them a live deposition a week before they  
7 are supposed to testify -- the week -- the week before --  
8 during the week before they are supposed to testify so they can  
9 have a full opportunity to be fully prepared for the witness.  
10 And you should let them know within a week which one of that  
11 could happen. So see if you two could work it out.

12 MR. ROCHON: Understood. So within a week I will let  
13 them know which it is going to be. If it is going to be by  
14 video, we will set it up several weeks beforehand. If it is  
15 going to be live, it will be the week before they testify.

16 THE COURT: If it is going to be by video, you should  
17 set it up with within three weeks.

18 MR. ROCHON: OK.

19 THE COURT: So if you have a week to tell them, then  
20 within the next two weeks just go ahead and do it by video and  
21 get it over with so you can concentrate on this job.

22 MR. ROCHON: That is fine. Thank you. We might be  
23 able to arrange to have those taken for defendants by someone  
24 other than Mr. Yalowitz and myself so that we can do them even  
25 while we are in court, if that is OK with --

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1 THE COURT: Sure.

2 MR. YALOWITZ: Your Honor, I'm not --

3 THE COURT: Do you want to agree to do it on the  
4 weekend, that is fine.

5 MR. ROCHON: I'm sure that we are going to want to  
6 have someone else take it that is going to be other than I.

7 THE COURT: I'm not sure that this is going to be  
8 critical to either case.

9 MR. YALOWITZ: I agree. OK. Two other really quick  
10 logistical things.

11 THE COURT: Yes.

12 MR. YALOWITZ: Number one. For the convictions, we  
13 have prepared five little binders that are organized by the  
14 five attacks for which there are convictions. We will give the  
15 Court a courtesy copy today. We will give the defendants a  
16 courtesy copy today. And we would like the Court's permission  
17 during the course of Mr. Kaufman's testimony to hand those out  
18 to the jury so they can page through them and see them.

19 THE COURT: As long as you have laid the foundation  
20 and they are all admitted into evidence, you can do that.

21 MR. YALOWITZ: Thank you, your Honor.

22 MR. ROCHON: So I take it five binders, one of the  
23 five -- one for each of the five is where there are  
24 convictions?

25 MR. YALOWITZ: That is correct.

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1 MR. ROCHON: OK. Again, we have this issue with  
2 redactions, your Honor. I mentioned it earlier. This comes up  
3 until we get through it. I am going to mention that to remind  
4 you.

5 THE COURT: You can remind me but I can't do anything  
6 with it until you tell me what your problem is.

7 MR. ROCHON: I understand but I got them Saturday --

8 THE COURT: I understand.

9 MR. ROCHON: I'll tell you, tomorrow morning I am sure  
10 I will be able to inform you on that issue.

11 MR. YALOWITZ: It sure would be helpful, your Honor,  
12 if defendants would talk to me and let me know what their  
13 problems are. It might save the Court some time.

14 THE COURT: It is always helpful for the lawyers to  
15 talk.

16 MR. YALOWITZ: That is my philosophy, but, you know,  
17 you learn something new with every case, I guess.

18 The final thing is, your Honor, we have a request to  
19 the Court for permission to play certain videos. We haven't  
20 given the Court that request yet. We will file the letter --

21 THE COURT: Is this the videotape we are talking  
22 about?

23 MR. YALOWITZ: This is different videos.

24 THE COURT: A different video?

25 MR. YALOWITZ: So these are videos primarily of PA

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1 senior officials speaking on tape, and we are going to file a  
2 letter and -- but I wanted to give the Court courtesy copies of  
3 the videotapes. And one of the videotapes --

4 THE COURT: Do you have the transcripts?

5 MR. YALOWITZ: I don't know if we have transcripts.  
6 But they are translated -- none of them are very long and they  
7 are like --

8 THE COURT: I think we discussed this several weeks  
9 back.

10 MR. YALOWITZ: Yes.

11 THE COURT: That is fine.

12 MR. YALOWITZ: Then one of them is something that we  
13 would like to play with Mr. Pearlman. It is a news footage --

14 MR. ROCHON: He sent it to us. We didn't object to  
15 it.

16 MR. YALOWITZ: OK. So we are fine with that.

17 THE COURT: If you are both happy, I am happy.

18 MR. ROCHON: Exhibit 49.

19 MR. YALOWITZ: 49, as edited to take out the sound.

20 THE COURT: That is fine. If you are both happy, I am  
21 happy.

22 MR. YALOWITZ: The two live witnesses are translated.

23 MR. ROCHON: We are not going to object as they are  
24 having a claim of present sense impression or spontaneous  
25 utterance, given that these people are being interviewed live



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1 on the scene.

2 I just want the Court to know and we are aware of  
3 this. There are some graphic scenes there in the sense of  
4 bodies but they are in bags and there is some blood but it is  
5 at a distance. Just so you are aware, we are calibrating our  
6 objection to that kind of evidence. So we recognize that this  
7 is --

8 THE COURT: You know --

9 MR. ROCHON: They can laugh but I didn't object.

10 MR. YALOWITZ: They are quick learners.

11 THE COURT: I will do whatever is necessary to  
12 minimize the undue influence of that kind of thing. But, look,  
13 I note, you know, the jury is not going to be surprised that  
14 there is some blood. OK? It just depends on the nature of we  
15 know what the most extreme photos are and we know what the  
16 least extreme photos are. So that is usually the rule of  
17 reason guides that.

18 MR. YALOWITZ: If your Honor will permit, I will hand  
19 two copies of the CD to this Court.

20 MR. ROCHON: I guess he has a got separate one.

21 MR. YALOWITZ: Yes. (handing)

22 THE COURT: All right. I will let you adjourn. And  
23 if I can get you something before the end of the day, if you  
24 would like the jury instructions, I will.

25 MR. ROCHON: So, Mr. Yalowitz, these are the

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1 additional videos and -- I don't know which videos we are  
2 getting at this point. I want to make sure that we are not  
3 going to use them tomorrow.

4 MR. YALOWITZ: No, we are not going to use them  
5 tomorrow.

6 MR. ROCHON: Except Mr. Pearlman's.

7 MR. YALOWITZ: Pearlman, yes, but it is not in there.  
8 Is one sufficient for the Court?

9 THE COURT: That is fine. All right.

10 Anything else?

11 MR. ROCHON: No. Thank you.

12 THE COURT: Go prepare. I will see you tomorrow  
13 morning at 9:30. I am going to send the jury to a different  
14 courtroom. When they've all gathered, I'm going to have them  
15 brought here and then we will begin that process.

16 MR. ROCHON: 9:30 for us?

17 THE COURT: Yes, please.

18 MR. ROCHON: Thank you, Judge.

19 MR. YALOWITZ: Thank you, your Honor.

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